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In the Supreme Court

OF THE

United States

JANUARY TERM, 1994

UNITED STATES OF AMERICA
Respondent,
v.
MARVIN L. WISEMAN AND WILLIAM D. METT
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Can federal mail and wire fraud statutes be used to criminalize *ex post facto* a description of Salvador Dali and other graphics and artwork as "original," when that description is permitted by state consumer protection statutes and is accepted in the industry and when the defendants were not and could not have been on notice that their description of their goods for sale as "original" was in violation of the law?

II. When a defendant has shown that during a substantial period of pre-indictment delay key material witnesses have died, does the burden shift to the prosecution to show that the testimony of those witnesses would not be exculpatory, as the Eighth Circuit has held, or does the burden remain on the defendant to show actual prejudice, as the Ninth Circuit held in this case?

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OPINION BELOW

The decision of the Ninth Circuit panel, rendered April 15, 1993, is unpublished; the text of that opinion is contained in Appendix A to this petition. The final order amending the opinion and denying rehearing, issued November 24, 1993, is unpublished; the text of that amendment and order is contained in Appendix B to this petition. The relevant opinion of the district court, also unpublished, is contained in Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The Ninth Circuit opinion was filed on April 15, 1993. The petition is timely, rehearing having been denied by the Ninth Circuit on November 24, 1993. *See* Appendix B; Sup. Ct. R. 13.1.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Frauds And Swindles [hereinafter Mail Fraud], 18 U.S.C. § 1341:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

2. Frauds By Wire, Radio Or Television [hereinafter Wire Fraud], 18 U.S.C. § 1343:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

3. United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

INTRODUCTION

Petitioners William Mett—owner and president of Center Art Galleries-Hawaii, Inc. [hereinafter CAG]—and Marvin Wiseman—vice-president and director of CAG—petition for certiorari after convictions of multiple counts of mail and wire fraud in violation of 18 U.S.C. §§ 1341, 1343. The convictions were based on allegations that over a 13 year period petitioners engaged in fraudulent sales of art reproductions of but four of the hundreds of artists whose work CAG offered for sale during that time. The artwork at issue — four Salvador Dali sculptures, 22 Dali graphics, and several lithographs and serigraphs of Anthony Quinn, Red Skelton and Tony Curtis — were based on paintings or other original artworks by these artists, which were reproduced on printing surfaces such as metal plates or stones, or, in the case of sculptures, reproduced from wax models or molds. The scheme to defraud was premised on allegedly false representations involving the nature and extent of artist participation in the creation and signing of the art reproductions, as well as the valuation of the artworks. After five months of trial and three weeks of jury deliberations, the defendants were convicted of most of the 104 Counts

charged. Petitioner Mett was sentenced to three years and fined $533,000. Petitioner Wiseman was sentenced to two and one-half years and fined $282,000. Petitioners were ordered to pay joint restitution of $314,979.

In sentencing Mett and Wiseman, District Judge Harold M. Fong remarked that he looked at the case with a "certain bit of sadness." Despite their convictions for alleged intentional fraudulent misstatements of fact, the Judge described the petitioners, as "two enormously talented persons .... *who conducted themselves in a manner that they thought were within the bounds of reason and proper business acumen*" and "*they don't possess the criminal profile.*" (Sentencing Transcript [hereinafter ST] 116-119) (emphasis added). Judge Fong continued Mett and Wiseman on bail pending appeal, stating: "I think there are genuine issues on appeal in this case." (ST 137) The Ninth Circuit affirmed the convictions and denied rehearing. (Appendix A, B).

To understand how these two talented persons "who conducted themselves in a manner that they thought were within the bounds of reason and proper business acumen," could nonetheless be convicted of *intentionally* defrauding their customers, one must examine both the government's unjustifiable expansion of the mail and wire fraud statutes in this case and the extraordinary delay in bringing the indictment which denied constitutional protections afforded to accused individuals.[1]

As to the mail and wire fraud statutes, the government convicted petitioners by giving a narrow and rigid definition of what permissibly constitutes an "original" lithograph — one that is "drawn by the hand of the artist to whom it is

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[1]Both issues were brought pretrial before the district court. The district court's order denying the motion to dismiss is set out in Appendix C.

ascribed." By so defining "original" as applied to fine art prints so as to criminalize art sales that do not meet that definition, a definition that the concurring Circuit opinion found "makes little sense,"[2] the government stretched the mail fraud statute beyond its clear limits to penalize conduct which is permitted by every state statute which regulates the sale of fine art prints, and which Congress has not seen fit to regulate. Essentially the prosecutors in this case turned the mail fraud statute into a consumer protection statute, and criminalized *ex post facto* descriptions of merchandise of which they did not approve. The government's chosen definition of "original" here is inconsistent not only with existing state consumer protection statutes but with the definition of "original" used by many artists including Dali and with centuries of tradition in printmaking.

Furthermore, the government's extraordinary delay in filing the indictment severely prejudiced petitioners. The indictment in this case was handed down ten years after CAG was first investigated by state authorities, two years after the federal investigation was essentially completed and three days after the death of the critical witness in this case — Salvador Dali. The death of Dali and other key witnesses allowed the government to secure petitioners' convictions based upon hearsay and questionable expert and lay opinion testimony about the very issues about which Dali was uniquely qualified to testify — the extent to which he worked on, supervised, approved or signed the works in question, and whether he, himself, considered these prints to be "originals."

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[2]As Judge Reinhardt noted in his separate opinion in this case, "the government's definition[ ] makes little sense.... [L]ithographs and etching[s] are not themselves drawn by the hand of the artist but rather based upon a plate or stone that is. Whether or not a lithograph or an etching is 'original' or otherwise, it is simply not drawn by the hand of the artist." (Slip op., Appendix A-23 (Reinhardt, J. concurring)).

I. THE DEFINITION OF "ORIGINAL"

A. The Start of Center Art Gallery.

CAG began in 1973 when petitioner William Mett purchased an interest in a small Honolulu art gallery. Mr. Mett hired petitioner Marvin Wiseman to serve as executive vice president in 1974.

The two petitioners eventually developed and expanded CAG's business until it comprised six galleries with over 200 employees selling artwork of hundreds of artists. In addition to the four artists involved in this case, CAG sold works by Rembrandt, Picasso, Goya, Miro, Monet, Renoir, Chagall, Norman Rockwell, and Le Roy Neiman, among numerous others. Eventually, CAG had the second largest collection of Dali's original works in the world.

B. The Salvador Dali Art.

The bulk of the government's case involved CAG's sales of the work of Salvador Dali. According to the government's evidence,[3] Dali, the internationally renowned Spanish artist, was "a genius" and "a remarkably unconventional man." He consciously sought to act in ways that defied rational interpretation, and to break down the lines between the rational and irrational; he boasted that "the only difference between me and a madman is that I'm not mad."

After 1960, Dali, like other artists such as Chagall and Calder, was "especially active in reproductive art processes of all sorts." The Dali museum guide noted that these "graphics often reflect the recent use of photomechanical[4] and lithographic processes for reproducing what are some-

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[3]The defense called only one witness, Anthony Quinn.

[4]A photomechanical reproduction is made by using a camera to separate the colors. Although the government tried to use the term "photomechanical" to denigrate the value of many of the prints in question, photomechanical is not a dirty word in the print industry.

times euphemistically called 'multiple originals'"—a term that is "widely used in the trade." Although Dali only personally worked on the plates for approximately 23-24 graphics, more than 1400 editions (where artisans other than Dali drew the image on the plates) have been approved as "legitimate" and "authentic" for the forthcoming Dali "catalogue raisonne"— that is, the "complete list of the works of an artist." Dali himself had stated that a common photomechanical reproduction, when blessed with his signature, was "in the same class as an original etching or lithograph" for the obvious reason that "the artistic content was the same. Dali quite logically maintained that the IDEA in the graphic was more important than any special kind of reproductive process."

CAG first acquired Dali graphics in the inventory bought from the gallery's former owner. Later, they sought to deal with Dali and his people more directly. The Dali works in question were all acquired from legitimate suppliers, often at great expense.

"Lincoln in Dalivision" was acquired from Martin Lawrence Limited Editions. Martin Lawrence described it as an "original lithograph with etching and intaglio." Dali personally made the etching plate for a small head that appears on the lower right side of the graphic. Dali's appointed archivist Albert Field declared a CAG "Lincoln" to be authentic.

In 1979, petitioners made arrangements through Dali's attorney and his chief aide to obtain an exclusive contract to purchase from Levine & Levine (a highly reputable publishing company), two "limited editions bas-relief work[s] created by Dali depicting": (1) "The Last Supper" and (2) "Christ of Saint John of the Cross." For these rights, CAG paid $2.6 million. Photographs were taken with Dali

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Photomechanical prints are sometimes more expensive than stone lithographs, and sometimes are appraised at thousands of dollars.

presenting Mett and Wiseman with the original wax sculptures created entirely by his own hand from which the bas-reliefs were made. The bas-reliefs were described by Dali's lawyer as "original works of art by Dali;" each one was "authorized by the Artist" and "bears his signature."

In July 1979, petitioners Mett and Wiseman travelled to Spain and spent a week visiting Dali, his wife Gala, and his entourage. While there, Mett and Wiseman negotiated the acquisition of two original hyperstereoscopic Dali paintings entitled "Christ of Gala," and later obtained the right to purchase and market lithographs based on these paintings. One of each pair of lithographs "was hand signed by Salvador Dali." Mr. Field testified that the "Christ of Gala" was "authentic."

In 1980, Dali entered into contracts with a French publisher Gilbert Hamon to reproduce various Dali artworks. In 1981, CAG obtained exclusive rights to lithographs of "Impressions of Africa" and "Metamorphosis of Narcissus."

That same year CAG obtained the exclusive lithographic reproduction rights for three other Dali paintings—"Christ of St. John on the Cross," "The Sacrament of the Last Supper," and "The Battle of Tetuan." The contract provided that Dali "will sign each print" and that the execution of the contract "constitutes the Bon a Tirer"[5] to print the lithographs. Mett sought the "finest printer in Europe"— Atelier Wolfensberger — to print the lithographs of these three works. He charged approximately $90,000-$100,000 for two editions of lithographs.

The "Last Supper" and "Christ of St. John" were printed on "presigned paper" that was provided by Jacques Carpen-

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[5] *"Bon a tirer"* is translated literally from French as "good to pull." Used as a term of art in this context, it means "authorization to print."

tier, a Paris art dealer. Carpentier died in December 1989, and was thus unable to testify. It was established that Dali and other artists would sign blank sheets of paper and authorize prints to be made on them. This was a common practice, and such prints were often sold by different galleries without disclosing whether the artist signed the work beforehand or afterward.[6]

By 1982, CAG had acquired the rights of reproduction for several Dali editions in return for payments ranging from $50,000 to $100,000 per edition. CAG hired Jacques David who had worked as Dali's etcher to do the prints. CAG had also entered into a contract to reproduce Dali's "The Trojan Horse" as a sculpture. David fashioned the maquette or model for this Trojan Horse, which was described as "an absolute masterpiece." David customarily obtained Dali's approval for each reproduction. CAG paid $2235 per sculpture to make the reproductions.

The last eight of the Dali graphics at issue were published in 1984 by Leon Amiel, "an eminent publishing figure in the international art world." Amiel had been made a Chevalier of the Legion of Honor (the highest civilian honor) by the President of France for his contributions to fine art printmaking. Amiel's files contained a letter agreement to produce some of the lithographs. The letter expressly indicated that Dali would sign blank paper for the edition as he had done for another work.

The government also contended that Dali's health had deteriorated from 1979 through 1981 when he became a recluse, and was physically unable to create artwork or sign

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[6]Numerous witnesses testified that Dali signed blank paper and that such paper was distributed to many people including Carpentier and Hamon. In fact, Dali was once ordered by an American court to provide thousands of sheets of presigned paper to satisfy a dispute over a contract for the production of lithographs.

graphics. However, Dali resumed painting in 1981 and painted some 92 oil paintings through March 1983. In fact, Field stated that as late as 1985 or 1986 Dali made a number of original drawings to commemorate the admission of Spain to the European Common Market.

Despite prosecution contentions that the Dali graphics were virtually worthless, the record is replete with testimony corroborating CAG's sales prices and subsequent appraisals. In fact, one customer became a one-man secondary market, reselling at a profit to approximately 25 customers numerous Dali artworks purchased from CAG.

C. The Quinn, Skelton & Curtis Art.

The remaining prints were done by celebrity artists Anthony Quinn, Red Skelton, and Tony Curtis. In addition to their acting careers, they are all painters. Quinn and Skelton testified at petitioners' trial that they supervised, approved and signed their prints. Curtis testified that he approved and signed them. They all approved of their works being marketed as "original."

D. What Customers Were Told About CAG's Art.

The government proffered a sea of conflicting evidence concerning sales representations made by CAG employees as to the extent of artist participation in creating the artworks in question. Some customers claimed to recall (often after five to ten years had lapsed) being told that the artist personally made the graphic. Others claimed they were told that the artist "supervised" the production. Others, including the undercover agents whose tapes provided the most trustworthy evidence of the content of the conversations, reported being informed that Dali "didn't do the original lithograph—very few artists do their own graphic work—and the Dalis are all done by professional lithographers." Virtually all took place outside of the presence of petitioners Mett and/or Wiseman, and more than

five years before trial. The trial court noted that on this, as with other factual issues, there was "countervailing proof."

Amidst the sea of conflicting testimony, one thing was clear: on the "key issue" of the definition of "original" there was no evidence that in selling their artwork Mett or Wiseman used the same definition as the government — made by the hand of the artist — and then defrauded customers by selling work that did not meet that definition. None of the thirty-four customer witnesses testified that petitioners Mett or Wiseman ever mentioned or talked about any definition of "original lithograph." Nor did any of these customers testify that any CAG salesperson ever explained or defined the term "original lithograph" in any way, let alone in such a way as to conform to the government's definition. The only evidence of any sort that attempted to define "original lithograph" in the same manner as the government was a xerox copy of a pamphlet picked up at the gallery by a customer along with many other materials discussing art. There was no evidence that this was a CAG publication or that petitioners Mett and Wiseman had ever seen it, let alone authorized it.

II. PRE-INDICTMENT DELAY

The alleged fraudulent scheme in this case began in 1977. The alleged fraud was first investigated by the Hawaii Attorney General's Office between 1979 and 1981, and subsequently re-investigated by the Honolulu prosecutor's office, U.S. Postal Inspectors and the U.S. Attorney's Office using the fruits of prior Hawaii Attorney General's Investigation. The investigation was essentially completed at the time the government executed a search warrant on April 15, 1987.

Nonetheless the government delayed the indictment for almost two years. In October 1988, Leon Amiel died. On January 23, 1989, Salvador Dali died. Three days later the

government filed the Indictment. A third witness, Jacques Carpentier died subsequently in December 1989.

In the absence of Dali and Amiel, the government's case relied heavily upon questionable opinion testimony based upon hearsay and double hearsay. In particular, the government relied heavily on the testimony of Robert Descharnes, who gave much of the damaging opinion testimony regarding the authenticity of the Dali works, and Dali's signatures. Descharnes, however, as Dali's chief aide during the last years of the artist's life, had prevailed upon Dali just before his death to give him the rights to reproduce Dali's work. Descharnes is president of Demart, a company selling Dali lithographs which bore an authorized stamped signature. Descharnes solicited galleries including CAG to sell the prints with the stamped signatures. These lithographs, however, were less valuable than lithographs authorized and hand-signed by Dali. Descharnes and Demart instigated a number of lawsuits against galleries and printers selling hand-signed Dali prints which sought to take the hand-signed prints out of circulation. Descharnes prevailed upon the French police to seize lithographs in one gallery alleging they were fakes. These allegations of fraud were later determined to be meritless.

Descharnes also tried to take CAG's Dali prints out of circulation by urging Mett to burn them. Shortly thereafter, in April 1987, the government seized all of CAG's Dali prints pursuant to a search warrant based in part upon information provided by Descharnes. During this period, amidst the accusations of counterfeits, lawsuits and seizures, the market for signed Dali prints dropped drastically. When the government took CAG's Dali prints off the market by seizing them, Demart first began marketing its prints successfully.

REASONS FOR GRANTING THE WRIT

I. THE GOVERNMENT'S USE OF THE MAIL AND WIRE FRAUD STATUTES TO CRIMINALIZE A PARTICULAR DEFINITION OF "ORIGINAL" AS APPLIED TO FINE ART PRINTS, WHERE STATE STATUTES PERMIT THE USE OF THAT DEFINITION AND WHERE THE DEFINITION OF "ORIGINAL" IS THE SUBJECT OF DEBATE IN THE ARTWORLD, RAISES IMPORTANT QUESTIONS AS TO CONGRESS' INTENT CONCERNING THE SCOPE OF THE MAIL AND WIRE FRAUD STATUTES, AS TO THE CONSTITUTIONAL REQUIREMENT OF STATUTORY NOTICE THAT CONDUCT HAS BEEN CRIMINALIZED, AND AS TO FEDERALISM, THE RESOLUTION OF WHICH WILL HAVE A BROAD IMPACT ON ARTISTS, ART DEALERS AND COMMERCE IN GENERAL

A. The Indictment, Argument, And Instructions Below Permitted The Jury To Convict Petitioners Solely On The Basis That They Used The Term "Original" As Applied To Artwork In A Manner Inconsistent With The Government's Narrow Definition Of That Term In The Indictment

The government's case against petitioners centered on the claim that it was fraudulent for CAG to sell certain artwork as "original." The indictment contained an initial section entitled "DEFINITIONS" that set forth, *inter alia*, a definition of "original lithograph" and "original etching" as one "drawn by the hand of the artist to whom the work is ascribed." In opening argument, the government described the definition of the term "original" as "key to this case," and referred to the term again and again. In closing, the prosecutor called the definition of the term "original" as the "heart" of the case, and repeatedly referred to the term. In submitting the case to the jury, the court permitted the

government to read the portion of the indictment that recited the government's definition of "original." The court, in its instructions, referred to "the false [representations] specified in the indictment," to "the fraudulent scheme alleged in the indictment," and to "fraudulent act[s] charged in the indictment."[8] The jury returned a general verdict; thus a reasonable juror could have returned a guilty verdict solely on the theory that petitioners' use of the term "original" was fraudulent because the works in question were not "drawn by the hand of the artist," as the government defined the word.

As both the district court and the Ninth Circuit noted in rejecting petitioners' challenges to this theory, the government alleged other fraudulent misrepresentations by petitioners: for example, that Mett and Wiseman subscribed to or adopted the government's own definition of the word "original," and then sold artwork that did not meet that definition. (Slip op., Appendix A at A-16-18; Dist. Ct. Order, Appendix C at C-24-29). At trial, however, there was no evidence that they subscribed to this definition. None of the thirty-four customer witnesses testified that petitioners Mett or Wiseman ever mentioned or talked to them about any definition of "original lithograph." Nor did any of these customers testify that any CAG salesperson ever explained or defined the term "original lithograph" in any way, let alone in such a way as to conform to the government's definition.[9] Thus, the jury was allowed to

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[8]The defense sought pretrial and after the close of the government's case to dismiss or withdraw that portion of the indictment premised on the use of the term "original." Those motions were denied. *See* Appendix C at C-24-29.

[9]The only evidence of a use of the term "original lithograph" which remotely related to the defendants at trial was a xerox copy of a pamphlet picked up at the gallery by a customer along with many other materials discussing art. There was no evidence that this was a CAG

convict petitioners solely because they sold as "original" artwork that did not conform to the government's narrow definition of that term — a definition which conflicts with state statutes and centuries of print-making tradition, and is a subject of debate in the art world today.

In a long line of cases dating to *Stromberg v. California*, 283 U.S. 359, 367-368 (1931), this Court has held that when a general verdict might have been based on a defective theory, the conviction must be reversed. *See Bachellar v. Maryland*, 397 U.S. 564, 571 (1970); *Leary v. United States*, 395 U.S. 6, 31-32 (1969). *See also Yates v. Evatt*, 500 U.S. ____, 114 L.Ed.2d 432 (1991) (mandatory presumption); *Boyd v. California*, 494 U.S. 370, 377-381 (1990); *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979). Since, as will be demonstrated below, the government's use of the mail and wire fraud statutes to criminalize all but one use of the term "original" in art sales violated important principles of federalism, statutory construction, and constitutional fair notice requirements and may have widespread impact on the art and business worlds, this Court should grant the petition.

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publication or that petitioners Mett and Wiseman had ever seen it, let alone authorized it. A timely relevance objection was denied. The pamphlet was the only evidence cited by the Ninth Circuit panel when it held in a footnote that "a rational juror could find Center Art endorsed the booklet." (Slip op., Appendix A-16 n.3).

Even if this were true, however, there was no evidence that *petitioners Mett and Wiseman* endorsed the booklet; nor did the panel attempt to justify its affirmance on that ground.

B. The Government's Choice Of Definitions Criminalizes Uses of The Term "Original" Which Are Accepted In The Artworld And Are Permitted By Every State Statute Which Regulates The Sale Of Fine Prints

As the government's own proof established, the meaning of the term "original" as applied to artwork has been a matter of dispute within the art world for over twenty-five years; no single meaning is correct or universally accepted. Virtually all of the experts who testified acknowledged that the term "original" is susceptible to other meanings and not limited to the government's narrow definition. The government experts acknowledged that the definition of "original" was the subject of much debate in the art world. One Dali expert considered the debate between "original" and "non-original" as applied to prints a matter of semantics. The government's definition of "original" also runs contrary to centuries of tradition in printmaking.[10]

The artists in this case considered prints that were not made by the artist to be original. Dali himself considered a common reproduction when blessed with his signature to be an "original" because the artistic content was the same; the idea was more important than the method of reproduction, and his signature was what gave it value. Quinn, Skelton and Curtis acknowledged that they did not participate in the reproduction of their paintings and drawings, but that they approved these reproductions and signed them and thus felt comfortable selling them as "originals."

Furthermore, many other artists considered or consider their graphics "original" even though they do not meet the definition imposed by the government here. Several govern-

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[10]*See, e.g.*, C. Zigrosser, *A Guide to the Collecting and Care of Original Prints* 28 (1965); F. Eichenberg, *Lithography and Silkscreen* 122 (1978).

ment experts provided examples of well-known artists such as Alexander Calder, Eyvind Earle, Aldo Luongo, Le Roy Neiman, Norman Rockwell, Andy Warhol, and Hiro Yamagata whose works are commonly sold as "originals" even though they were neither "drawn by the hand of the artist" nor created with the artist's participation. Still others artists, including Guy Buffet, Margaret Keane, Christian Lassen, and David Lee, have stated elsewhere that they consider their works original although they did no work on the plates or prints themselves. *See* Caterall, "Senate Panel Rejects Bill to Tighten Regulations on Sale of Fine Prints," *Honolulu Star Bulletin* (Mar. 25, 1986).

Moreover, the government's definition of "original" conflicts with numerous state statutes. In Hawaii, where the instant actions occurred, the legislature has carefully regulated the sale of prints since 1978. In revising the statute in 1986, the Hawaii legislature debated at length whether to attach a narrow definition to the words "original" and "authentic." After much testimony from artists, and from art dealers including petitioner Wiseman, the bill was enacted without limits on the use of those terms or definitions of them. Haw. Rev. Stat. Section 481F (1985 & Supp. 1992) (repealing Ch. 481, effective July 1, 1986). *See* Caterall, "2 Art Measures, 2 Sets of Standards," *Honolulu Star Bulletin* (Mar. 13, 1986). Statutes in the nine other states which regulate the sale of fine prints reflect significant commonality in that none purport to define "original" fine prints.[11] The government's definition of "original" thus

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[11]*See* Ark. Code Ann. §§ 4-73-201 *et seq.* (Michie 1987); Cal. Civil Code §§ 1740 *et seq.* (Deering 1984 & Supp. 1994); Ga. Code Ann. §§ 10-1-430 *et seq.* (Michie 1990); Ill. Ann. Stat. ch. 815, §§ 345 *et seq.* (1993); Md. Com. Law Code Ann. §§ 11-8A-01 *et seq.* (1992); Mass. Gen. Laws Ann. ch. 74, §§ 277C *et seq.* (West 1984 & Supp. 1993); Mich. Comp. Laws Ann. §§ 442.351 *et seq.* (1989); Minn. Stat. Ann. §§ 324.06 *et seq.* (West 1981 & Supp. 1994); Or. Rev. Stat. §§ 359.200

criminalizes conduct which many states have expressly declined to prohibit, and impinges on their efforts to regulate this aspect of commercial activity.

C. The Government's Use Of The Mail And Wire Fraud Statutes To Criminalize One Definition Of "Original" As Applied To Fine Art Prints, Went Far Beyond Congressional Intent, And Violated Principles Of Federalism And Petitioners' Right To Fair Notice

By criminalizing conduct which the state of Hawaii (along with every other state which regulates the sale of fine art prints) has intentionally declined to forbid, the prosecutors in this case severely impinged on principles of federalism, and thus extended the purview of the mail fraud statute far beyond its intended reach. As this Court has stated, "the words 'to defraud' in the mail fraud statute. . . usually signify the deprivation of something of value by trick, deceit, chicane or overreaching." *Carpenter v. United States*, 484 U.S. 19, 27 (1987); *McNally v. United States*, 483 U.S. 350, 358 (1987). "To defraud" does not usually signify obtaining something by use of a prosecutorially disapproved definition. That is the realm of consumer protection statutes. In this case, Congress has declined to so legislate in the area of fine prints, and many states have taken it upon themselves to do so. However, these states all permit the use of the word "original" in a manner prosecuted here. The federal executive branch, through the prosecutors in this case, thus has asked and received judicial approval to transform Sections 1341 & 1343 into federal consumer protection statutes, and so invade the province of the states in these matters.

In that respect, this case is similar to *McNally* in which the government sought to have this Court interpret the mail fraud statute to criminalize practices of state officials which

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et seq. (1983); S.C. Code Ann. §§ 39-16-10 *et seq.* (Law Co-op. 1985 & Supp. 1992).

the state did not prohibit. This Court stated that "if a state law expressly permitted or did not forbid" the conduct, "it would take a much clearer indication than the mail fraud statute evidences to convince us that" the conduct is fraudulent "and is forbidden under federal law." *Id.* at 361 n.9. The Second Circuit has ruled similarly in *United States v. Pisani*, 773 F.2d 397, 409-11 (1985). As in *McNally*, without express congressional indication this Court should decline to allow the government to use the mail fraud statute to punish as fraudulent conduct that which is permitted by state law. As demonstrated below, the potential for abuse is widespread; the prosecutorial tactic here employed would adversely effect numerous artists, art dealers, designers and store owners across the country. Congress clearly has the power to enact a consumer protection statute which does define "original" as applied to fine art prints, but in the absence of such statute or any indication of intent to extend the mail fraud statute so far, the judiciary should not tread where the legislature has not.

Moreover, to interpret the statute broadly, as the prosecution has done here, so as to criminalize uses of particular descriptions of art or items for sale in general also raises grave due process notice problems. As this Court has emphasized many times, "[i]t is a fundamental tenet of due process that '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statues.'" *United States v. Batchelder*, 442 U.S. 114, 123 (1979), quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). "[L]aws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). *See also Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

In construing the mail fraud statute in *McNally*, this Court reiterated the principle that, "[t]here are no con-

structive offenses; and before one can be punished, it must be shown that his [or her] case is plainly within the statute." 483 U.S. at 360, quoting *Fasulo v. United States*, 272 U.S. 620, 629 (1926). *See also Batchelder*, 442 U.S. at 121 (1979) (it is a "well-established doctrine that ambiguities in criminal statutes must be resolved in favor of lenity"); *Rewis v. United States*, 401 U.S. 808, 812 (1971) (same). Thus, in *McNally* this Court declined to "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials." *McNally*, 483 U.S. at 360. Similarly, this Court should not leave the outer boundaries of the statute ambiguous so as to involve the Federal Government in setting standards of disclosure in matters of consumer protection which the states, despite legislating extensively, have declined to enact.

Without notice of what descriptions of merchandise will be later deemed fraudulent, many more persons who have "conducted themselves in a manner that they thought were within the bounds of reason and proper business acumen" will find themselves convicted and in prison. (ST 116-119). Thus, this Court should speak authoritatively on the outer bounds of this statute.

D. Allowing the Use Of The Mail And Wire Fraud Statutes To Criminalize Any Use Of "Original" As Applied To Fine Art Prints Which Were Not "Hand Drawn By The Artist" Would Have Widespread Adverse Implications For Artists, Art Dealers, And All Vendors In General

Allowing the use of the mail and wire fraud statutes to criminalize any use of the word "original" to describe fine art prints which were not "hand drawn by the artist" would have widespread adverse implications for artists, art dealers, and all vendors in general. As mentioned above, numerous

artists living and dead have deemed their prints "original" even if they themselves did not personally work on them. All of those living artists mentioned above, along with others who subscribe to their definition of "original," would be subject to mail fraud prosecutions should this Court let petitioners' convictions stand. Furthermore, any art dealer who sold any of the graphics by these artists would be subject to such prosecution.

Nothing, moreover, limits application of this theory to artists who deal in print. For example, the entire fashion industry is premised upon designers who give their names to dresses, suits and accessories. Many of these designers, like print artists, have workshops and assistants to whom they give general directions and lend their approval later by allowing their name to be affixed to the garments. Under the government's theory Calvin Klein, Giorgio Armani and Donna Karan together with stores that sell their clothes could be prosecuted for mail fraud. A whole host of designers and commercial vendors could be prosecuted for describing their wares in a manner consistent with state consumer fraud statutes, and consistent with prevailing practice, yet which violates a definition chosen by a particular federal prosecutor. Given the vast implications of the expanded theory of mail fraud on which the prosecutors based this case, this Court should grant the petition.

II. THIS COURT SHOULD GRANT THE PETITION FOR CERTIORARI TO RESOLVE AN IMPORTANT CONFLICT AMONG THE CIRCUITS REGARDING WHO BEARS THE BURDEN OF PROVING PREJUDICE FROM PRE-INDICTMENT DELAY ONCE THE DEFENSE HAS ESTABLISHED THAT WITNESSES HAVE DIED OR THEIR TESTIMONY HAS OTHERWISE BEEN LOST

In this case, petitioners argued that their defense was severely prejudiced by the extraordinary delay in prosecution of this case during which several key witnesses died — most notably Salvador Dali himself — and the memories of nearly all witnesses who eventually testified faded. The alleged fraudulent scheme in this case began in 1977. The alleged fraud was first investigated by the Hawaii Attorney General's Office between 1979 and 1981, and subsequently re-investigated by the Honolulu prosecutor's office, U.S. Postal Inspectors and the U.S. Attorney's Office using the fruits of prior Hawaii Attorney General's Investigation. According to the Postal Inspector, the CAG's alleged fraudulent sales presentation with respect to the Dali art "has been basically the same" since 1977. Much of the artwork listed in the Indictment was named in the Postal Inspector's search warrant April 13, 1987 search warrant affidavit. Forty-eight alleged victims had been identified by April 15, 1987, 15 more than were listed in the Indictment. As the Postal Inspector testified during the pretrial suppression hearing "we felt that anything that we found in the [April 15] search would be icing on the cake."

Nonetheless the government delayed the indictment for almost two years. In October 1988, Leon Amiel died. On January 23, 1989, Salvador Dali died. Three days later the government filed the indictment. A third witness, Jacques Carpentier died subsequently in December 1989.

The loss of key witnesses, in particular Dali himself,[12] and other witnesses' faded memories of events which occurred six to thirteen years before, severely crippled the petitioners' ability to defend themselves. In the absence of Dali, the government was allowed to present opinion testimony from purported experts (often based upon hearsay and double hearsay) about precisely the questions Dali was uniquely capable of answering — the extent to which Dali authorized, created, supervised, approved or signed the artworks in question. Descharnes (who as mentioned above profited directly from the seizure of CAG's Dali graphics and had made meritless accusations of counterfeiting against other galleries) was allowed to testify extensively about the Dali graphics. Most importantly, Descharnes was allowed to testify as a lay witness that all of the 22 Dali graphics bore forged signatures.[13]

Dali could have conclusively refuted this testimony, as well as an expert opinion that the bas-reliefs in question did not conform with Dali's intent. He could have disputed the testimony of numerous witnesses that his health did not allow him to sign prints or authorize or supervise their production. He could have verified witness accounts that he etched part of the "Lincoln," that he authorized the use of presigned paper, that he entered into valid contracts with Amiel and with CAG, and that printers customarily sent their work to him for approval. Most importantly, on the key

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[12]At trial, the court even noted to the jury: "I'm sure everyone would like to have Dali here, but we don't have that advantage and that privilege."

[13]Descharnes' qualifications in this regard were highly suspect. He purported to be able to discern with respect to several Dali graphics not only that the signatures were forged, but who forged them. Descharnes, however, could not even recognize his own signature, and mistakenly testified that a letter he had signed bore a forged signature.

The government called no handwriting experts.

issue of what constitutes an "original" print, Dali could have confirmed his published statement that even a photomechanical reproduction signed by him was "in the same class as an original etching or lithograph" because the artistic content was the same.

Since nine of the twenty-two Dali graphics at issue in this case were acquired from Amiel, the loss of his testimony was highly prejudicial. In a civil case arising out of the Dali controversy, Amiel testified about the details of Dali's authorization, approval and signing of one of the works in question. He further testified in a deposition that all of the more than 20 Dali graphics which he published were hand-signed by Dali, and that Dali signed blank paper which Amiel later obtained. Amiel could have refuted the opinion testimony that his graphics were cheap photomechanical reproductions, and disputed the government accusations that he was a counterfeiter.[14]

In addition to the death of the two most important exculpatory witnesses, petitioners clearly were prejudiced by the dimming of witnesses' memories of events five to thirteen years before trial. Most witnesses acknowledged that they could not remember precisely what was said in their conversations with CAG personnel.

In *United States v. Marion*, 404 U.S. 307 (1971), this Court noted that the applicable statutes of limitations do not always protect a defendant's right to a timely indictment. This Court agreed that "the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown . . . that pre-indictment delay . . . caused substantial prejudice to [defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical

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[14]Additionally, Carpentier, who died months after the indictment, could have verified Dali's practice of presigning paper and the authenticity of the paper he provided to Wolfensberger.

advantage over the accused." Id. at 324. Subsequently, in *United States v. Lovasco*, 431 U.S. 783 (1977), this Court clarified the constitutional limits and held that actual prejudice is a necessary but not sufficient predicate for a due process violation due to pre-indictment delay. *Id.* at 789. Once delay is established, a court must consider the reason for the delay. Delay for investigation does not constitute a due process violation. *Id.* at 795-796. This Court suggested, however, that "prosecution delay incurred in reckless disregard of circumstances" may violate due process. *Id.* at 795 n.17. Further, at least one lower court has found that the due process clause is violated where actual prejudice is conceded and the government was merely negligent in not bringing the case sooner. *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990), *cert. denied*, 498 U.S. 1016 (1990). The basic inquiry then becomes whether the government's action in prosecuting after substantial delay violates "fundamental conceptions of justice" or "the community's sense of fair play and decency." *Lovasco*, 431 U.S. at 790.

In interpreting this Court's directive that actual prejudice is a necessary precondition to a due process violation, however, lower courts have split over the issue of the burden of proving prejudice to the defendant when material witnesses have died or testimony otherwise lost during the delay. In *United States v. Barket*, 530 F.2d 189 (8th Cir. 1976), the Eighth Circuit held that when, as in petitioners' case, material witnesses "are dead or unable to recall circumstances that existed more than five years ago . . . the government must bear the burden of demonstrating that the missing witnesses did not possess exculpatory evidence." *Id.* at 196, citing *United States v. Norton,* 504 F.2d 342 (8th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975). On the other hand, the Ninth Circuit along with other circuits have refused to employ any burden-shifting in the event of the death or other loss of witnesses, and place the burden on defendants. *See, e.g., United States v. Loud Hawk*, 816 F.2d

1323, 1325 (9th Cir. 1987) (disagreeing with *Barket*); United States v. United States Gypsum Co., 550 F.2d 115, 119-120 (3rd Cir. 1977) (disagreeing with *Barket*), *aff'd on other grounds*, 438 U.S. 422 (1978). *See also United States v. Fuesting*, 845 F.2d 664 (7th Cir. 1988) (burden on defendant); *United States v. Comosona*, 614 F.2d 695 (10th Cir. 1980) (same).

Despite the evidence of prejudice, relief was denied. The choice of these burdens of proofs was central to the denial of relief in this case. The Ninth Circuit panel noted that the Circuit has "questioned whether lost testimony would ever qualify for the level of prejudice necessary to establish a due process violation. Our reservation is especially true where the defendants' claims as to what Dali and Amiel would have said are purely speculative." (Slip op., Appendix A-3) (citations omitted). As demonstrated above, Dali and Amiel were unquestionably material witnesses, and could have corroborated much of the evidence which indicated that the prints in question were authorized, approved and signed by Dali. If the *Barket* standard had been employed, the burden would have shifted to the prosecution to show that their testimony would not have been exculpatory.

To put the burden on the defendant's shoulders in these circumstances to show that the witness would have exculpated him or her is patently unfair. The defense here, as the panel noted, had no reason to preserve the witnesses' testimony before indictment. (Slip op. Appendix A-4).

The harm is magnified in a case such as this one where by virtue of mailings subsequent to the sales of art work, the government was allowed to punish alleged fraudulent sales which fell primarily outside of the five year statute of limitations. Contrary to the panel's decision, the statute of limitations simply did not protect the petitioners.

In light of the conflict between the Circuits on the issue of the burden of proving prejudice, this Court should speak authoritatively and settle the question.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

Dated: February 22, 1994

Respectfully submitted

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Not for Publication
United States Court of Appeals
For the Ninth Circuit

United States of America,
Plaintiff-Appellee,

v.

Marvin L. Wiseman,
Defendant-Appellant.

No. 90-10612
D.C. No. CR 89-00125-03-HM

United States of America,
Plaintiff-Appellee,

v.

Center Art Galleries-Hawaii, Inc.,
Defendant-Appellant.

No. 90-10616
D.C. No. CR 89-00125-01-HM

United States of America,
Plaintiff-Appellee,

v.

William D. Mett,
Defendant-Appellant.

No. 90-10617
D.C. No. CR 89-00125-02-HM

Memorandum*

Filed April 15, 1933

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, District Judge, Presiding

Argued and Submitted July 20, 1992
San Francisco, California

Before: Canby, Reinhardt, and Leavy, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

FACTS AND PROCEEDING

This criminal action concerns fraud in the sale of art attributed to the renowned 20th century Spanish artist Salvador Dali and to the American celebrities Anthony Quinn, Red Skelton, and Tony Curtis. Those convicted of mail and wire fraud in violation of 18 U.S.C. § 1341 and 1343 are Center Art Galleries-Hawaii, Inc. (Center Art), its president and majority stockholder, William D. Mett, and its vice-president and director, Marvin L. Wiseman. The defendants' appeals are consolidated. They challenge the sufficiency of the evidence as well as numerous rulings. We begin with the pretrial issues, proceed to the issues arising from trial, and conclude with a sentencing issue.

Preindictment Delay

The defendants argue that extraordinary preindictment delay prejudiced their Fifth Amendment due process rights. "The Fifth Amendment guarantees that defendants will not be denied due process as a result of excessive preindictment delay." *United States v. Sherlock*, 962 F.2d 1349, 1353 (9th Cir. 1992). However, "[t]he courts have traditionally granted the government a good deal of leeway in their decisions as to the timing of . . . indictments." *United States v. Mays*, 549 F.2d 670, 678 (9th Cir. 1977).

The defendants were indicted more than ten years after a State investigation of Center Art began. They argue the trial court erred because: (1) testimony at trial showed they were prejudiced by the deaths of Dali and Amiel in the interim, whose testimony "clearly would have been exculpatory," (2) trial testimony demonstrated that the witnesses' memories had dimmed, (3) the statute of limitations had run in certain of the mail and wire fraud counts, (4) the State of Hawaii and federal government investigations were really one and the same, and (5) the defendants would not be expected to depose witnesses before their indictment.

First, we have "emphasized that protection from lost testimony generally falls solely within the ambit of the statute of limitations." *Moran*, 759 F.2d at 782. The trial court correctly found that the five-year statute of limitations of 18 U.S.C. § 3282 was not exceeded. We have questioned whether "lost testimony would ever qualify for the level of prejudice necessary to establish a due process violation[.]" *Id.* Our reservation is especially true where the defendants' claims as to what Dali and Amiel would have said are purely speculative.

Second, the fact that "witness after witness testified that they could not recall precisely what was said five, eight and eleven years prior to trial" is not surprising and does not show how that lack of precision impaired the defendants' abilities to defend themselves. *See Sherlock*, 962 F.2d at 1354.

Third, the defendants list thirty-four counts that they claim are barred by the five-year statute of limitations because the *superseding* indictment was filed more than five years after the date of the indictment. However, the rule in this circuit is:

> [W]here the counts of an original indictment are simply duplicated verbatim into a superseding indictment, the statute of limitations on those counts is tolled, even if additional counts that are subject to no limitations objections are added. This is because when charges from an original indictment are duplicated in a superseding indictment the defendant cannot claim he lacked notice of those charges.

United States v. Pacheco, 912 F.2d 297, 305 (9th Cir. 1990) (citation omitted). The defendants do not contend that the counts at issue were not duplicated verbatim from the original indictment or that they lacked notice in any other manner. The original indictment was dismissed at the same

time the motion to dismiss the superseding indictment was denied; thus, there was no time when tolling ceased. *See United States v. Grady*, 544 F.2d 598, 601 (2d Cir. 1976) ("The statute begins to run again on those charges only if the indictment is dismissed, and the Government must then reindict . . . in order not to be time-barred.").

Fourth, the "dual sovereign" doctrine forecloses the argument that the statute of limitations was exceeded. *See United States v. Cordova*, 537 F.2d 1073, 1076 (9th Cir.), *cert. denied*, 429 U.S. 960 (1976) (applies dual sovereignty doctrine directly to claims of Fifth Amendment violations). The state's delay and failure to indict cannot be charged to the federal prosecution, absent evidence of collusion. *See id.*

The trial court correctly evaluated whether there was actual prejudice to the defendants and whether the delay was caused by the government's culpability. *See Sherlock*, 962 F.2d at 1353-54. In the process of its evaluation, the trial court observed that the defendants were as capable as the government of preserving the testimony of Dali and Amiel. However, we have stated that "until the defendant is indicted or arrested, he has no reason to attempt to preserve the witness's testimony." *Mays*, 549 F.2d at 677 n.12.[1] Nonetheless, the court properly refused to dismiss the indictment.

The Grand Jury Proceedings

"[D]ismissal of the indictment is appropriate only 'if it is established that the [alleged] violation substantially influenced the grand jury's decision to indict,' or if there is 'grave

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[1] The case the trial court relied on, *U.S. v. Alderdyce*, 787 F.2d 1365, 1370 (9th Cir. 1986), is inapposite. *Alderdyce* does not involve a preindictment delay, but rather a *Brady* violation in which the defense made a tactical decision not to investigate exculpatory information. 787 F.2d at 1370.

doubt' that the decision to indict was free from the substantial influence of such violations." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (quoting *United States v. Mechanik*, 475 U.S. 66, 78 (1986) (O'Connor, J., concurring)).

The defendants argue that the grand jury's exposure to adverse publicity prejudiced their decision to indict. Courts generally will not dismiss an indictment on the basis of pre-indictment publicity. *In Re Grand July of Southern Dist. of Ala.*, 508 F. Supp 1210, 1213 (S.D. Ala. 1980) ("the settled law is that pre-indictment publicity is an inadequate grounds upon which to base the dismissal of an otherwise properly returned indictment"). In *United States v. Pinley*, the Court was unable to find any case which dismissed an indictment on the basis of pre-indictment publicity. 705 F. Supp 1297, 1307 (N.D. Ill. 1988).

The defendant bears the heavy burden of proving actual bias and prejudice. *Id.* The defendant cannot meet his burden merely by pointing to the existence of pre-indictment publicity or attempting to demonstrate that the grand jurors were exposed to such adverse publicity. *Id.* at 1308; *In Re Grand Jury of Southern Dist. of Ala.*, 508 F.Supp. at 1214 ("The law does not require that grand juries be shielded from news reports.").

The defendants claim that certain exculpatory evidence was not presented to the grand jury. However, courts have no authority under their inherent supervisory powers to mandate that prosecutors present exculpatory evidence to the grand jury. *United States v. Williams*, 112 S. Ct. 1735, 1736 (1992).

The defendants criticize the prosecutor for presenting only three witnesses, two of whom were "summary" witnesses. However, summary witnesses are appropriate unless the record reveals misconduct with respect to their summa-

ries. *Bank of Nova Scotia*, 487 U.S. at 260-61. No misconduct is evident.

The defendants argue that the government's expert, Peter Morse, presented "vicious and inflammatory" and false testimony before the grand jury. They claim that Morse's testimony was hearsay, "unreliable" and "provocative."

"An indictment based solely on hearsay evidence does not violate the Fifth Amendment." *United States v. Samango*, 607 F.2d 877, 880 n.6 (9th Cir. 1979); *United States v. Chanen*, 549 F.2d 1306, 1311 (9th Cir.) (rejects rule authorizing dismissal of indictments if hearsay alone is deliberately used when better evidence is available), *cert. denied*, 434 U.S. 825 (1977). Further, unreliable evidence is insufficient to require a dismissal of an indictment. Challenges either to the reliability or competence of the evidence will not be heard. *Williams*, 112 S. Ct. at 1746; *Samango*, 607 F.2d at 880 & n.6 ("[A]n indictment cannot be attacked on the ground that evidence before the grand jury was incompetent or inadequate.")

We decided in *Samango* that, among other improprieties, conclusory statements by a witness as to the guilt of defendants biased a grand jury. 607 F.2d at 883-84. The question that arises from Morse's testimony is whether he unfairly biased the grand jury. Although the Supreme Court has never specifically held that the Constitution requires unbiased grand juries in federal prosecutions, *United States v. Williams*, 112 S. Ct. 1735 (1992); *Beck v. Washington*, 369 U.S. 541 (1962); *Costello v. United States*, 350 U.S. 359 (1956), the Court has stated that the Fifth Amendment "requires nothing more" than an "indictment returned by a legally constituted and unbiased grand jury." *Costello*, 350 U.S. at 363 (footnote omitted). We have dismissed an indictment where the prosecutor's cumulative errors prejudiced the defendants by "producing a biased grand jury." *Samango*, 607 F.2d at 884-885.

It is the grand jury's function "to assess whether there is adequate basis for bringing a criminal charge. . . . [T]o make the assessment it has always been thought sufficient to hear only the prosecutor's side." *Williams*, 112 S. Ct. at 1744 (citation omitted), *cf. Samango*, 607 F.2d 877. The trial court correctly found no evidence that the government knowingly had introduced any false testimony. Even though Morse expressed an opinion about the defendants' guilt, his statement does not show prosecutorial misconduct or prejudice.

In *Samango*, the witness who gave testimony was not familiar with the investigation; he reported events he did not observe; and he drew frequent conclusions concerning guilt. 607 F.2d at 883. The problem we described in *Samango* is not present here because, as the defendants admit, Morse was intimately involved in the investigation. Moreover, the cumulative errors in *Samango* produced the bias, not just the testimony of one witness. *Samango*, 607 F.2d at 884.

The fourth contention is that the prosecutor dumped over 1500 pages of transcripts from the original grand jury before the second grand jury with no indication that the transcripts were read before the latter jury voted to indict. The defendants rely on *Samango*, 607 F.2d at 881, to show impropriety. However, the reason for our concern in *Samango* was that "the transcript was an impressive repertory of insults and insinuations." *Id.* There is no similar accusation here. In *Samango* we concluded that the "cumulative effect" of several errors and indiscretions produced the bias. *Id.* at 884. Moreover, the grand jury here was not told the presecutor had a deadline, as happened in *Samango*.

The defendants contend that Morse should not have informed the second grand jury that the first grand jury voted to indict. However, there is no evidence that his information resulted in a biased grand jury. The role of the grand jury is to find whether there is an adequate basis for

bringing a criminal charge. *Williams*, 112 S. Ct. at 1744. We cannot assume there was an inadequate basis simply because one grand jury was informed about another grand jury's conclusion.

The defendants imply that the prosecutor was responsible for leaking information from the grand jury proceedings in violation of Fed. R. Crim. P. 6(e)(2). Even assuming that the prosecutor did so, this is not grounds for dismissing the indictment: "a knowing violation of Rule 6 may be punished as a contempt of court [rather than by dismissing the indictment]. See Fed. Rule Crim. Proc 6(e)(2)." *Bank of Nova Scotia*, 487 U.S. at 263.

The Use of Illegally Seized Evidence at Trial.

The defendants claim that all of the Dali artwork was seized illegally and was introduced at trial to their prejudice. They claim there was no probable cause and the government search warrants lacked particularity.

The trial court correctly ruled that the warrants with the attached affidavit contain sufficient particularity as to the Dali artwork and that there was probable cause to seize it. Three tests determine whether a description is sufficiently precise: (1) whether probable cause exists to seize all items of a particular type; (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those that are not; and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued. *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986). After careful review, we are satisfied that the warrant and affidavit meet these tests. The warrant with its incorporated affidavit demonstrates there was probable cause to seize Center Art's inventory of Dali works. The specificity of the affidavit with respect to Dali underscores why the warrant was ruled overbroad

where it called for the seizure of the works or records not related to Dali.

The defendants argue that no materials may be retained by the government under an unconstitutional general warrant "where one of the warrant's provisions, when examined independently, might be considered sufficiently specific." However, our rule is that "where invalid portions of a warrant may be stricken and the remaining portions held valid, seizures pursuant to the valid portions will be sustained." *Spilotro*, 800 F.2d at 967.

The defendants' final argument regarding the search warrant is that certain trial testimony revealed that false statements were made in the search warrant affidavit, thereby entitling them to a *Franks* hearing. *See Franks v. Delaware*, 438 U.S. 154 (1978). However, there is no indication the *Franks* issue was ever before the district court as part of the motion to suppress: the defendants rely on trial testimony in an attempt to establish falsity. We decline to decide this issue in the first instance. *See United States v. Smith*, 918 F.2d 1501, 1509 (11th Cir. 1990) (request untimely where motion to suppress did not include a *Franks* request and defendant failed to meet the court's deadline for such a request), *cert. denied*, 112 S. Ct. 151 (1991); *United States v. Mayomi*, 873 F.2d 1049, 1056 n.8 (7th Cir. 1989) (because defendant failed to comply with procedural requirement that a *Franks* motion be filed, he waived the issue on appeal).

Non-Expert Testimony on Dali's Signature

The defendants contend the trial court erred in admitting opinion testimony under Rule 701 as to the authenticity of Dali's signature from a lay witness, Robert Descharnes, a long-time associate of Dali. They state "Rule 701 does not permit a lay witness to express an opinion which requires . . . the special skill and knowledge of an expert." They claim

Descharnes' testimony as an "expert" was highly prejudicial.

The argument that Descharnes testified as if he were an expert is meritless. Defense counsel obtained Descharnes' admission that he was not an expert on handwriting. The court explained to the jury that Descharnes was testifying as a lay witness only. The defense asked Descharnes to describe "particular characteristics" of Dali's signature as if he were an expert.

"This court will not disturb a trial court's discretion in admitted lay-opinion testimony absent clear abuse." *United States v. Juvenile Male*, 864 F.2d 641, 647 (9th Cir. 1988). The trial court did not clearly abuse its discretion in admitting Descharnes' lay opinion about the authenticity of Dali's signature. "A signature may be identified by testimony of a person familiar with the signature." *United States v. Whittington*, 783 F.2d 1210, 1215 (5th Cir.), *cert. denied*, 479 U.S. 882 (1986). The evidence was more than adequate to show that Descharnes was familiar with Dali's signature.

Rulings Regarding Expert Testimony on the Bas-Reliefs

The defendants argue the court erred by refusing to qualify Albert Field as an expert in Dali sculpture when he was called as a defense witness after he had testified for the prosecution.

"[T]he trial court has broad discretion to admit or exclude expert testimony." *United States v. Aguon*, 851 F.2d 1158, 1171 (9th Cir. 1988). The decision to admit or exclude expert testimony is not disturbed on appeal unless it is manifestly erroneous. *United States v. Patterson*, 819 F.2d 1495, 1507 (9th Cir. 1987). The court did not abuse its broad discretion. Although an expert in Dali prints, Field had not concentrated on Dali's sculpture; he did not consider himself an expert on Dali sculpture; and he had never studied art. Field's profession was teaching English. He was

never compensated for his work as Dali's archivist. Therefore, while Field had a considerable knowledge of Dali prints, that knowledge did not extend to sculpture.

The defendants have numerous objections to the admission of the expert testimony of Fred Roster, a state university art teacher and sculptor. "The general test regarding the admissibility of expert testimony is whether the jury can receive "appreciable help" from such testimony." *United States v. Gwaltney,* 790 F.2d 1378, 1381 (9th Cir. 1986), *cert. denied,* 479 U.S. 1104 (1987). There is no doubt that Roster's testimony could have "appreciably helped" the jury. Roster explained in detail the difference between the wax molds done by Salvador Dali and the finished product that was sold by the gallery as an original work of art. Without Roster's testimony, the jury might not have understood or possibly even detected the differences between the wax originals and the final product, or understood the production process for bas-reliefs.

Whether There Was Error in Admitting Evidence in Violation of Federal Rules of Criminal Procedure 802 and 403

The defendants claim hearsay was admitted in violation of Federal Rule of Evidence 802. They also claim unfairly prejudicial evidence was admitted in violation of Federal Rule of Evidence 403. The defendants cite to nine examples of alleged hearsay and/or unfairly prejudicial evidence that were admitted. Eight of the nine instances involved complaint letters sent to Center Art or to the Honolulu Office of Consumer Protection, some of which contained the hearsay statements or opinions of third parties.

We have approved the admission of letters from disatisfied customers that were read to a jury. *Phillips v. United States,* 356 F.2d 297, 301-02 (9th Cir. 1965), *cert. denied,* 384 U.S. 952 (1966). The admission was approved because the letters tended to show the "state of mind" of the

defendants, which is an exception to the hearsay rule. *See* Fed. R. Evid. 803(3).

Because the court made it clear that the complaint letters and documents were admitted not to show their truth but rather to show the defendants' state of mind, we conclude the trial court did not abuse its discretion in admitting the letters. *See United States v. Kirk,* 844 F.2d 660, 663 (9th Cir.), *cert. denied,* 488 U.S. 890 (1988). The government had to prove, among other things, that the sale of the artwork as original constituted a scheme to defraud. The letters tended to show that defendants were engaged in an ongoing attempt to defraud. *See Phillips,* 356 F.2d at 301.

We also conclude that, in its rulings on admissibility, the court correctly weighed the letters' probative value as opposed to their prejudicial effect in accordance with Rule 403. *See, e.g.,* Reporter's Transcript Vol. 20 at 141 (court states "There is no way you can keep out all hearsay. . . . It's only when it is so prejudicial that it outweighs any probative value that I'm compelled to keep it out under 403, and I don't find this to be the case here.").

The ninth witness, Janet Owsky, testified about telephone conversations with third parties. The record shows that this testimony was admitted not for its truth but to show why Owsky was unable to realize the investment value of her artwork. We find no abuse of discretion where the hearsay was admitted to show a course of action and where a limiting instruction was given. Moreover, the conversation is relevant. It tends to prove the difficulties the clients had in selling artwork that had been represented as original.

The defendants object to the admission of an appraisal by Albert Field. In his appraisal, Field states: "Dali has made an official public announcement that he signed no editions and no blank sheets after 1980." The defendants objected to the admission of this sentence on grounds of hearsay and

prejudice. Although the objection was overruled at the time, five months later the Court ordered the sentence redacted. However, the defendants claim "the damage had long been done" by the time of the redaction.

There is no prejudice to the defendants. Mett's reply to Benzenberg states: "We do not accept as gospel Mr. Field's remarks, supposedly attributed to Dali, that he signed no editions after after 1980." RT Vol. 9 at 65. This sentence conveys the full meaning of the redacted sentence to the jurors. The defendants themselves wished to leave Mett's statement in the record, stating that "Mr. Mett's letter does not repeat the particular prejudicial allegation." RT Vol. 9 at 84.

The defendants argue that a prior consistent statement of Denise Wheeler's should not have been admitted to rehabilitate her under Rule 801(d)(1)(B), since she had a motive to falsify before she made the statement. Her motive, according to the defendants, was her distrust of Center Art Gallery, which arose after her first answer to the 1987 questionnaire but before the June 1988 statement. The defendants' suggested motive is far-fetched. Where, as here, there is only a speculative motive to falsify, exclusion of the prior consistent statement is not appropriate. *United States v. Miller,* 874 F.2d 1255, 1275 (9th Cir. 1989).

The defendants contend the trial court erroneously admitted testimony from former Center Art employees. The defendants protest that no connection was made between the employees' statements and Wiseman and Mett. They claim unfair prejudice. Citing to 1929 cases from another circuit, the defendants maintain that a defendant cannot be held responsible for the fraudulent statements of another. *See Beck v. United States,* 33 F.2d 107, 112 (8th Cir. 1929); *Barrett v. United States,* 33 F.2d 115, 116 (8th Cir. 1929).

The rule of *Beck* and *Barrett* does not apply where "there is adequate circumstantial evidence to show authorization due to the fact that the representations were substantially similar to those made by defendant." *United States v. Vanderpool*, 528 F.2d 1205, 1207-08 (4th Cir. 1975) (footnote omitted), *cert. denied*, 424 U.S. 922 (1976). There was substantial evidence in the record that Mett and Wiseman authorized the statements of their employees.

Whether There Was Sufficient Evidence to Show the Defendants Misrepresented the Value of the Artwork

The defendants contend the indictment charged them with misrepresenting the value of the artwork by alleging that the "fair market value" of the artwork was significantly less than Center Art represented. They contend they made no representations about the fair market value as defined by the experts;[2] rather, they made representations in appraisals for insurance purposes. Therefore, they claim there was insufficient evidence of fraudulent misrepresentation. They also claim that an expression of opinion as to the artworks' value is not actionable as a false representation of material fact.

In reviewing the sufficiency of the evidence, "[t]he critical inquiry . . . is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Thomas*, 887 F.2d 1341, 1343 (9th Cir. 1989) (internal quotations and citations omitted). A rational trier of fact could reasonably believe that Center Art's scheme was fraudulent because it failed "to measure up to the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the

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[2] According to the defendants, the experts defined "fair market value" as the price that could be realized through a sale at high level auction houses.

general and business life of members of society.' " *United States v. Buckley*, 689 F.2d 893, 897 (9th Cir. 1982), *cert. denied*, 460 U.S. 1086 (1983) (quoting *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980)).

The defendants argue their statements of opinion could not constitute fraud. They state: "Here, where . . . the appraisals were based on Center Art's most recent retail sales, the appraisal was a reasonably based opinion of the artwork's value."

"To prove fraud a plaintiff must establish that the defendant made false representations of material fact intended to induce plaintiff to act, the representations were made with knowledge of, or reckless disregard for, their falsity, and the plaintiff justifiably relied upon those false representations to his detriment." *Bulgo v. Munoz*, 853 F.2d 710, 716 (9th Cir. 1988). "[A]n actionable misrepresentation must relate to fact and cannot be based on an expression of opinion or a prediction." *Id.*

Viewing the evidence in the light most favorable to the government, a rational trier of fact could have concluded that the misrepresentations related to material facts. None of the consumers were sophisticated in art or its purchase. They did not know what characteristics to look for to determine whether the art was original, or whether it was likely that Dali personally supervised the production of the art, as Center Art represented. They did not know the characteristics to look for to determine whether their art was an original lithograph or a cheap photomechanical reproduction. The facts Center Art presented to clients were material to their purchases. Moreover, because there was evidence that the artwork was not authentic and that the defendants, who were extremely sophisticated in the art world, knew that it was not, the appraisals could not have been a reasonably based opinion of the artwork's value.

The Definition of 'Original' Art

The defendants argue the government adopted an arbitrary definition of 'original' in the indictment. They maintain there was insufficient evidence to prove they were guilty of mail and wire fraud under the government's definition. They also claim they lacked notice that their conduct would violate the law because the Hawaii legislature has not restricted the term 'original' to the indictment's narrow definition.

The indictment's definition of 'original' is: "*original lithograph*" and "*original etching*" refer specifically to a lithograph or etching drawn by the hand of the artist to whom the work is ascribed." Supplemental Excerpt of Record at 15. The defendants contend "the government failed to prove that the defendants had ever utilized the term 'original' in accordance with the restrictive definition in the indictment or had intended that the word be understood . . . by others to mean 'drawn by the hand of the artist.'" Center Art Opening Brief at 36. The record, however, contains evidence the defendants intended their clients to understand 'original' as the government defines it. We refer specifically to the contents of a booklet at Center Art depicting the gallery's logo titled "What Is An Original Print?" *See* RT Vol. IV at 120; Exh. 747E; RT Vol. IV at 122.

The booklet, available to Center Art clients,[3] contradicts the defendants' assertion that they did not intend others to understand that 'original' means 'drawn by the hand of the artist.' It contradicts their assertion that an original includes "the artist participat[ing] in the production of [photome-

[3] The defendants argue the booklet had nothing to do with Center Art. However, a client testified he found the booklet at Center Art Gallery; that he read it; and that he understood it to be part of the information that Center Art was providing to him. A rational juror could find Center Art endorsed the booklet.

chanically reproduced] products." The booklet states that such products "are not true original prints." Moreover, a document given to Center Art's salespeople distinguishes between originals and photomechanical reproductions. RT Vol. IV at 195-96.

The indictment alleges that Center Art "engage[d] in the marketing of purported original limited edition lithographs and etchings that were misrepresented as having been authored, produced and signed by Salvador Dali," Supplemental Excerpt of Record at 25, para. b, while in fact the lithographs and etchings were "photomechanical reproductions of some genuine and some fake Dali originals." *Id.* In this way, the defendants allegedly were able to sell art as an investment to unsuspecting clients at vastly inflated prices. The court instructed the jury that the government had to prove the allegations in the indictment. RT Vol. 50 at 184. The court also instructed on the defense of lack of intent to defraud. *Id.* at 185-86. The court instructed the jury that the intent to defraud "is a question of fact for you to determine like any other fact." *Id.* at 186-87.

The elements of mail fraud are: 1) a plan or scheme reasonably calculated to deceive; 2) the intent to defraud; and 3) the use of the mails to carry out the plan or scheme. *United States v. Bonallo*, 858 F.2d 1427, 1433 (9th Cir. 1988). Viewing the evidence in the light most favorable to the prosecution, a rational juror, with evidence that certain artwork was represented as 'original' as defined in Center Art's promotional literature while in truth it was not, could find the defendants knew they were deceiving clients by selling photomechanical reproductions as originals. The defendants' argument that they had no notice their conduct was illegal also must fail.

The defendants argue that the Hawaii civil statute, H.R.S. Chapter 481F, effective July 1, 1986, did not prohibit defendants' use of the term 'original' to describe prints,

the plates for which were created by someone other than the artist. While that may be true, a rational juror could still conclude the evidence showed the defendants misrepresented the artwork they sold. The art was highly priced for what it really was; it was sold as an investment; and there were appraisals that invariably showed substantial appreciation. On the other hand, there was no evidence the clients were told the art fit Hawaii's definition. Hawaii law is irrelevant to the misrepresentation charged under 18 U.S.C. §§ 1341 and 1343.

Whether the Court Erred by Failing to Compel the Production of Witness Interview Notes Taken by the Government

The defendants claim the court erred by refusing to require the prosecutor to produce his notes of interviews with trial witnesses pursuant to the Jencks Act, 18 U.S.C. § 3500(b). The defendants claim the trial court "summarily dismissed every request by defense counsel under 18 U.S.C. § 3500 for copies of those notes".[4]

A district court's denial of a motion to produce a witness' statement pursuant to the Jencks Act, 18 U.S.C. § 3500(b), is reviewed for an abuse of discretion. *United States v. Augenblick*, 393 U.S. 348, 355 (1969). A conviction will be affirmed if the "Jencks error is more than likely harmless." *United States v. Wallace*, 848 F.2d 1464, 1470 (9th Cir. 1988).

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[4] The Court ruled that the notes were not obtainable because Osborne was an attorney working on the case. However, "a writing prepared by a Government lawyer relating to the subject matter of the testimony of a Government witness that has been 'signed or otherwise adopted or approved' by the Government witness is producible under the Jencks Act, and is not rendered nonproducible because a Government lawyer interviews the witness and writes the 'statement.' " Goldberg v. United States, 425 U.S. 94, 98 (1976).

The ruling the defendants challenge occurred very early in the trial in a hearing during the first witness's testimony. The defendants produced no evidence at the hearing nor did they offer any proof that any of the witnesses adopted the government's writings as their own or that anything was a substantially verbatim recital of what a witness said, as the Jencks Act requires. Further, their request to produce was premature. Section 3500(a) specifies that Jencks Act statements are to be produced only *after* direct examination of the witness. We have ruled that "[t]he Jencks Act prohibits a defendant from compelling the production of a prior statement of a government witness in the government's possession until 'said witness has testified on direct examination in the trial of the case.' 18 U.S.C. 3500(a)." *United States v. Rewald*, 889 F.2d 836, 865-66 (9th Cir. 1989), *amended on other grounds*, 902 F.2d 18 (9th Cir.), *cert. denied*, 111 S. Ct. 64 (1990). The court did not abuse its discretion.

Whether the Prosecutor Made False Statements on Rebuttal That Denied Defendants a Fair Trial.

The defendants argue that during rebuttal summation, the U.S. Attorney made material false representations. They claim they were unable to object because the Court admonished them not to make contemporaneous objections.[5] They claim the Court erred by not granting their motion for surrebutal and by rejecting their proposed supplemental instructions.

Whether to allow a jury to consider comments made in closing argument to which one party objects is reviewed for an abuse of discretion. *United States v. Makhlonta*, 790 F.2d 1400, 1403 (9th Cir. 1986). Where there are no objections

[5] The record plainly shows the Court did not preclude objections. *See* RT Vol. 49 at 9-10.

at trial, we review for plain error. *United States v. Feldman*, 853 F.2d 648, 652 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1164 (1989).

The defendants claim the prosecutor distorted testimony by not accurately reading from the transcript what Leroy Olson said. While it is true the prosecutor misstated the record, sufficient corrective measures were taken.

The defendants say they argued in closing that Amiel was responsible for obtaining Dali's authorization and signature on the artworks once they were completed, not Center Art. They claim the prosecutor undercut this position with false statements. Because we cannot find the argument defendants claim they made in the record where they indicate it is to be found, we cannot evaluate it. We have "no obligation to mine the full record for [appellate] issues." *See Schneider v. TRW, Inc.*, 938 F.2d 986, 990 n.2 (9th Cir. 1991) (citing *Nilsson, Robbins, Dalgardn, Berlinger, Carson & Wurst v. Lousiana Hydrolec*, 854 F.2d 1538, 1545 (9th Cir. 1988) (per curiam)).

Moreover, while the prosecutor named the wrong painting when he stated there was correspondence to prove that Mett agreed to have paintings printed on Dali's presigned paper, there is evidence that Mett agreed to have other paintings printed on presigned paper, *see* RT Vol. 34 at 26; yet his staff understood that the prints were signed by Salvador Dali *after* the printing. RT Vol. 42 at 142. This evidence is indicative of the intent to deceive. The evidence shows that Center Art staff's misguided understanding was commensurate with the clients' understanding.

The defendants argue that the prosecutor "invented an inculpatory Eitingon letter, one that would prove his case." At issue is the interpretation of part of the letter.

"The prosecution is granted reasonable latitude to fashion closing arguments. . . . [P]rosecutors are free to argue rea-

sonable inferences from the evidence." *United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990). A reasonable inference from Eitingon's letter is that Dali was not to see the "Trojan Horse" sculpture because he might not approve of it. The prosecutor is not bound by a defendant's view of the evidence.

We review for an abuse of discretion a determination that rebuttal statements constitute permissible inferences. *Id.* Because the inference was permissible, the court did not abuse its discretion by denying surrebutal argument on this issue.

In rebuttal, the government stated:

> Now, Mr. Wing also put up for you a great big blowup of the small print on the bottom of the invoices that says: Absolutely no cash refund, merchandise credit only, and he says: How can there be a fraud when you tell people no cash refund, merchandise credit?
>
> . . . .
>
> In addition, they gave out those invoices with the small print to some of the victims — people, of course, who bought them over the phone never say them[.]

RT Vol. 50 at 138.

The defendants argue this statement means telephone customers never got copies of the invoice, which they say is refuted by the evidence. However, the prosecutor states he meant that no telephone purchasers would ever know, *until they received the invoice in the mail after purchase*, that there would be no cash refunds. The prosecutor's explanation of his statement is reasonable.

During rebuttal the prosecutor argued that a customer, Ann Armet, testified to having been told that Anthony Quinn "worked on the [serigraphs of his original] himself." RT Vol. 50 at 152. The defendants claim this alleged

testimony was never heard, and that on cross-examination, Armet contradicted it in any case.

This claim is not borne out by the record. Moreover, the prosecution pointed out that the questionnaire had a number of repetitive questions that might have confused people who filled it out.

The defendants argue that Center Art never admitted "Lincoln in Dalivision" was a photomechanical reproduction, as the government argued. *See* RT Vol. 50 at 139. However, there was testimony from Dr. Elizabeth Harris of the Smithsonian Institution that the print for "Lincoln in Dalivision" was made using a commercial half-tone screen. In addition, Ms. Petranek was given a refund by Center Art for the print. These facts downplay any prejudice to the defendants from the government's misstatement, if any. Moreover, the jury was instructed beforehand that closing arguments do not constitute evidence. *See* RT Vol. 49 at 12.

To conclude, none of the prosecutor's statements are clearly prejudicial. There is no plain error in the court's denial of surrebutal.

Whether the District Court Properly Imposed Fines on Mett and Wiseman

Defendants Mett and Wiseman argue that the imposition of fines on them violated section 5E1.2(a) of the Sentencing Guidelines. They say the court found they were indigent and unlikely ever to pay the fines imposed. This argument is without merit. In imposing the sentences after hearing the evidence, the court found as follows:

> This a big case, it is at least a $5 million case, it could be as much as a $40 million case if the government had its opportunity to at least pose its theory. Just in the audit year of 1984 alone that disclosed sales well in

> excess of $1 million, and we're talking about 13 years, we're talking about a very viable company. . . .

Id. at 122. It it clear the court found the defendants had the ability to pay the fine in the future. It is the defendants' burden to establish inability to pay or that they will unable to pay the fine in the future. *United States v. Quan-Guerra*, 929 F.2d 1425, 1427 (9th Cir. 1991). They did not do so.

CONCLUSION

For the reasons stated, all rulings of the trial court are AFFIRMED.

Reinhardt, Circuit Judge, concurring:

I concur in the majority's affirmance of the defendants' convictions and in all parts of its disposition save the discussion of the definition of original art. The indictment defines an "original lithograph" as a lithograph drawn by the hand of the artist to whom the work is ascribed. An original etching is defined in a parallel fashion. The government argues and the majority concludes that the defendants adopted this definition. However, the government's definitions make little sense. As stated elsewhere in the indictment, lithographs and etching are not themselves drawn by the hand of the artist but rather based upon a plate or a stone that is. Whether or not a lithograph or an etching is "original" or otherwise, it is simply not drawn by the hand of the artist. Therefore, I doubt that the defendants defined "original art" as set forth in the indictment.

Nevertheless, I agree that the defendants' arguments that the convictions are fatally defective must fail. The government need not prove all the facts charged in an indictment — only enough facts to prove the essential elements of the crime. *United States v. Jenkins*, 785 F.2d 1387, 1392 (9th Cir. 1986). Insofar as the language of an indictment goes beyond alleging elements of the crime, it is mere surplusage that need not be established at trial. *Id.* The

essential elements of mail and wire fraud were alleged and proved. The indictment's definitions of original lithograph and etching are surplusage.

In essence the defendants argue that because of the misdefinition of "original" there was a fatal variance between the indictment and the charges of which they were convicted. A variance is fatal if the evidence presented at trial, together with the jury instructions, raises the possibility that a defendant was convicted of an offense other than that charged in the indictment. *United States v. Wright*, 932 F.2d 868, 874 (10th Cir. 1991). In a mail or wire fraud prosecution the defendant is entitled to be put on notice of the essential nature of the fraudulent scheme alleged and it is that scheme that must be proven. *See United States v. Pisani*, 773 F.2d 397, 409-11 (2d Cir. 1985). Here, the indictment meets that requirement. It charges in great detail that the defendants made multiple knowingly false representations regarding the art they sold in order to obtain a price substantially in excess of its true value. The jury instructions did not mention the term "original". Instead, they correctly defined the essential elements of the crimes with which the defendants are charged. The jury was specifically instructed that the defendants had to have made false, material representations and that they had to have known the falsity of those representations when they made them. The trial record is replete with false statements by the defendants or their agents regarding the value of the works of art and the participation of the artists in their creation.

In sum, the convictions must be affirmed because there is sufficient evidence from which a rational trier of fact could have found that the essential elements of the crimes with which the defendants were charged were proven beyond a reasonable doubt. Although there was an insubstantial variance between the indictment and what was proven at trial, the defendants were properly convicted of the fraudulent schemes of which the indictment put them on notice.

Not for Publication
United States Court of Appeals
For the Ninth Circuit

United States of America,
Plaintiff-Appellee,

v.

Marvin L. Wiseman,
Defendant-Appellant.

No. 90-10612

D.C. No. CR 89-00125-03-HM

United States of America,
Plaintiff-Appellee,

v.

Center Art Galleries-Hawaii, Inc.,
Defendant-Appellant.

No. 90-10616

D.C. No. CR 89-00125-01-HM

United States of America,
Plaintiff-Appellee,

v.

William D. Mett,
Defendant-Appellant.

No. 90-10617

D.C. No. CR 89-00125-02-HM

Order Amending Memorandum and
Denying Petition For Rehearing

Filed November 24, 1993

Before: Canby, Reinhardt, and Leavy, Circuit Judges.

The Memorandum disposition filed on April 15, 1993, is amended as follows:

At pages 9-10, by replacing the second paragraph under the Heading "The Use of Illegally Seized Evidence at Trial," continuing to the first partial paragraph on page 10, with the following:

"The trial court correctly ruled that the warrants contain sufficient particularity as to the Dali artwork and that there was probable cause to seize it. Three tests determine whether a description is sufficiently precise: (1) whether probable cause exists to seize all items of a particular type; (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those that are not; and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued. *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986).

After careful review, we are satisfied that these tests are met. Although an unattached, unincorporated affidavit may not be used to cure a warrant that is allegedly lacking in sufficient particularity, *id.* at 967, that fact has no bearing on the Magistrate Judge's use of the affidavit to determine whether there was probable cause. The affidavit sufficiently described fraud in the sale of the artwork of Salvador Dali to establish probable cause. Moreover, the description in the warrant of Dali artwork to be seized; i.e., "prints attributed to Salvador Dali; numbered, unnumbered, signed, unsigned;" and "other works of art attributed to Salvador Dali," is not too general or overbroad. Our previous opinions regarding the particularity with which items listed in search warrants are to be described are concerned only with generic categories of items. *See, e.g., Spilotro*, 800 F.2d at 963; *United States v. Cardwell*, 680 F.2d 75, 78 (9th Cir. 1982). To describe Dali artwork is not to describe a generic item.

The description is also sufficiently particular to prevent a "general, exploratory search[ ] and indiscriminate rummaging through a person's belongings." *See Spilotro*, 800 F.2d at 963.

Finally, to the extent the appellants argue the Dali art should have been more particularly described in the warrant given the descriptions in the affidavit, the government's probable cause was not limited to the evidence described in the Portmann affidavit. It could fairly be inferred that the episodes described in the affidavit were simply the "tip of the iceberg" with respect to fraud in the sale of Dali artwork. *See United States v. Offices Known as 50 State Distributing Co.*, 708 F.2d 1371, 1375 (9th Cir. 1983) (citation omitted), *cert. denied*, 465 U.S. 1021 (1984)."

With this amendment, the petition for rehearing is denied.

Criminal No. 89-00125 HMF

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,
Plaintiff.
vs.
CENTER ART GALLERIES-HAWAII, INC., WILLIAM D. METT, and MARVIN L. WISEMAN,
Defendants.

Order Granting In Part and Denying In Part Defendants' Various Motions to Dismiss, for the Production of Items, and for a Bill of Particulars

INTRODUCTION

Defendants Center Art Galleries-Hawaii, Inc. ("Center Art"), William D. Mett ("Mett"), and Marvin L. Wiseman ("Wiseman") have been indicted on charges of mail fraud, wire fraud, securities fraud, and aiding and abetting. These charges relate to allegations of art fraud involving the works primarily of artist Salvador Dali ("Dali"). Trial on this criminal matter is now scheduled to commence on October 31, 1989. On May 3, 1989, defendants filed the instant pre-trial motions; defendants then served a corrected version of these same motions on May 15, 1989.

In these multifarious motions, defendants first ask this court to dismiss the entire indictment pursuant to Fed. R. Crim. P. 12(b). Defendants next ask the court to suppress all trial evidence, including all Dali artwork, as "tainted fruit" of the illegal search and seizure pursuant to Fed. R. Crim. P. 12(b) and 41(e). Third, defendants seek additional discovery and the disclosure of various grand jury-related documents. Finally, defendants ask this court to grant them a bill of particulars pursuant to Fed. R. Crim. P. 7(f). Oral arguments on these motions were heard before

the court on the following dates: June 27 and 28; July 19, 20, and 21; and August 9, 10, 11, and 15, 1989. Leslie E. Osborne and Robert C. Godbey appeared on behalf of the government; Brook Hart, John R. Wing, and Lawrence I. Fox appeared on behalf of defendants. The court will individually address the various pre-trial motions now before it, after first setting forth the case's now familiar and lengthy procedural history.

BACKGROUND

After having initiated a continuing investigation into alleged widespread art fraud perpetrated by Center Art, the government executed a search warrant at its executive office, warehouse, and four galleries in Oahu on April 15, 1987. At that time, the government seized five truckloads of art, documents, books, ledgers, records, and other objects. The government later copied many of these seized documents, including Center Art's legal files.

On February 1, 1988, in response to Center Art's challenge of the search warrant authorizing this search, Judge Rafeedie ordered the return of all property seized by the government, except for prints and other works of art attributed to Salvador Dali. *See In re Motion for Return of Property Pursuant to Rule 41*, 681 F. Supp. 677 (D. Haw. 1988), *aff'd sub nom. Center Art Galleries-Hawaii Inc. v. U.S.*, 875 F.2d 747 (9th Cir. 1989). In his opinion which has since been affirmed by the Ninth Circuit Court of Appeals, Judge Rafeedie held that the government's warrants were unconstitutionally broad. *See id.* at 680. The court's opinion was based on the fact that the only evidence of fraud contained in the warrant's supporting affidavit related to works attributed to Salvador Dali. Since the court found no evidence suggesting that Center Art's alleged fraud permeated the works of other artists, the warrant failed to satisfy the Fourth Amendment's "particularity" requirement with

respect to all other artworks. Accordingly, Judge Rafeedie ordered evidence relating to all artists, *save for Dali*, to be suppressed and returned to Center Art.

In reaching his decision. Judge Rafeedie rejected the government's "inevitable discovery" argument. The government, which at that time was in possession of the relevant evidence, had attempted to cure the warrant's defects by relying on its grand jury subpoenas of equivalent scope that were served on Center Art subsequent to the illegal search. In effect, the government claimed that all evidence inevitably would have been discovered through the subpoenas, so that this evidence need not be excluded nor returned. However, Judge Rafeedie determined that similar problems of overbreadth, which were fatal to the search warrants, also rendered the subpoenas unenforcable. The court, in fact, concluded that because the government already held the evidence in question, the subpoenas were nothing more than a government insurance policy in case the search later were invalidated.

Subsequently on March 23, 1988, Judge Rafeedie denied the government's motion for reconsideration and stay of his order. In its reconsideration motion, the government had argued that the seized property was being held pursuant to a recently issued grand jury subpoena and, thus, need not be returned. In rejecting the government's argument, the court held the following:

> If property is impermissably [sic] held by the government pursuant to an illegal search and seizure, and that defect can be cured merely by issuing a subpoena after the seizure, then the subject of the subpoena would be precluded from raising any rights it may have in opposing the subpoena because the property is already in the government's possession . . . If the government wishes to enforce the subpoena as to material seized in the

> raid, it must await the return of property pursuant to this Court's Order.

Order Denying Motion to Stay and Motion to Reconsider, Civil No. 88-76 (March 23, 1988) at 3.

Having failed in its attempts, pursuant to both warrants and subpoenas, to seize the bulk of Center Art's property for its investigation into alleged art fraud, the government commenced with the property's return. Although the government did return to Center Art the seized property itself, however, it withheld copies of the same property for purposes of its investigation. In its Order of October 31, 1988, this court rejected the government's distinction with regard to the copies and ordered their immediate return as well. This court reasoned that Judge Rafeedie's order nowhere suggested that copies were exempt from the original return order. Furthermore, the court in its Order of October 31, 1988, granted two motions to quash grand jury subpoenas duces tecum which had been served on Center Art.

Center Art's first of these two motions to quash, which motion was filed on June 29, 1988, responded to the government's so-called "all documents" subpoena issued on May 12, 1988; this subpoena requested the production of "any and all documents" from July 1, 1977, to the present "relating to Center Art Galleries-Hawaii, Inc. . . ." According to the subpoenas terms, these documents were to include the following:

> [A]ll records now in the custody of Center Art Galleries at any location maintained by them on the island of Oahu or previously maintained by them at [the four Oahu galleries, the warehouse, and the office].

The subpoena's attachment then listed items identical to those in the warrants that previously had been found to be unconstitutionally overbroad.

With respect to Center Art's first motion to quash, this court found that the government's "all documents" subpoena was an attempt "to circumvent the court's order to return property." Order Granting Motion for Immediate Compliance With Court's Order and Granting Motions to Quash. Civil No. 88-76 (October 31, 1988) at 10. First, this court found the government's subpoena to be unconstitutionally overbroad in scope, making compliance with it both unreasonable and oppressive. This conclusion largely was based on the fact that the subpoena's terms mirrored those of the unconstitutional warrant, as well as the fact that the only evidence of Center Art fraud at the time related to works by Salvador Dali. Moreover, the court granted Center Art's motion to quash, because the government still possessed copies of the wrongfully seized items. In this regard, the court concluded that "the government is not entitled to the documents they seek until they return *all* property they obtained from the seizure, including copies." *Id.* at 12. Further emphasizing this point, the court continued with the following: " '[i]f the government wishe[d] to enforce the subpoena as to material seized in the raid, *it must await the return of the property pursuant to this Court's Order.*' " *Id.*, *quoting* Order of March 23, 1988 at 3. (emphasis in the original).

Center Art's second of its two motions to quash, which motion was filed on July 13, 1988, also responded to a grand jury subpoena issued on May 12, 1988. This second subpoena sought the production of any and all records and documents relating to 81 images of Dali artwork, including the artwork itself. Defending the scope of its second subpoena, the government argued that it was entitled to these requested documents under the "independent source" exception to the exclusionary rule. In essence, the government argued that it was entitled to such production, since it had issued a subpoena equal in scope to the "all documents" subpoena prior to the invalid search — thus, the indepen-

dent source. In this way, the government sought the production of actual property for which it then only had copies.

Faced with this second motion to quash, this court first rejected the government's reliance on its original "all documents" subpoena as being a "catch-all cure for the illegal search." *Id.* at 14. The court emphasized that this alleged independent source was identical to the "all documents" subpoena already found to be unconstitutionally overbroad. The court, however, did note that "the subpoena seeking production of Dali artwork and related documents may well derive from a source independent of the illegal search." *Id.* at 14-15. Nevertheless, since the government had failed to identify that independent source, Center Art's motion to quash was granted "subject to the government's later ability to establish that the subpoena was issued pursuant to information obtained independently of the illegal search and seizure." *Id.* at 16.

After this string of misfortune with its previous warrants and subpoenas, the government on October 5, 1988, served on Center Art six additional grand jury subpoenas duces tecum. The government attempted to use these subpoenas to cure many of the defects in its previous warrants, so that it could gain access to much of the same evidence that had earlier been suppressed as a result of the overbroad search; this evidence was to be used for grand jury purposes only. In its published order of March 7, 1989, this court quashed four of these six government subpoena requests as again being hopelessly overbroad and burdensome. *See In re Grand Jury Proceedings,* 707 F. Supp. 1207, 1219 (D. Haw. 1989). After rejecting defendants' exclusionary rule argument within the peculiar grand jury context in which the case was then situated, the court upheld only the validity of the two grand jury subpoenas related to works of Salvador Dali — i.e., the so-called "81 Images" and "Three Images" subpoenas. The court, therefore, ordered the defendants to comply

with the grand jury process only to the extent of those two Dali-related subpoenas. In so doing, the court also rejected defendants' First Amendment "public display" and Fifth Amendment "takings" arguments. *See id.*

On January 26, 1989, and after lengthy grand jury deliberations, the government issued its instant 53 page, 93 count indictment against defendants. In its indictment, the government charges defendants with the following criminal activity: 1) mail fraud (18 U.S.C. § 1341); 2) wire fraud (18 U.S.C. § 1343); 3) securities fraud (15 U.S.C. §§ 77(q)(c) and 77(x)); and 4) aiding and abetting (18 U.S.C. § 2). After reciting three pages of art-related definitions, the indictment indexes three pages of Dali art reproductions that are the focus of the alleged criminal activity. On page six, the indictment then introduces the alleged fraudulent scheme that is claimed to have run from September 16, 1977, up to and including the date of the indictment. The thrust of the alleged fraudulent scheme is described in the indictment as follows:

> [D]efendants and their sales employees and other Center Art personnel . . . would and did unlawfully enrich themselves by fraudulently selling to the public inexpensive art reproductions at grossly inflated prices by misrepresenting calendar quality prints as being original limited edition lithographs and etchings, and by misrepresenting industrial quality stamped figures as being bas-reliefs done by the hand of the famous Spanish artist, Salvador Dali. Center Art, Mett and Wiseman further falsely represented that these reproductions were either produced by Dali personally or done under his direction and supervision and that the alleged Dali lithographs, etchings and bas-reliefs were signed or approved by Dali after the purported lithographs, etching and bas-reliefs had been created.

> It was a further object of the scheme to induce sales by representing that a secondary market for the resale of Dali art reproductions as well as reproductions of Center Art's so-called celebrity artists, Anthony Quinn, Red Skelton and Tony Curtis . . . existed as alleged by Center Art when these reproductions were initially sold at grossly inflated prices that had no relation to their fair market value and the investment potential attributed to these reproductions was illusory.

Indictment at 6-7.

The indictment next sets forth, on pages 11 through 16, the means by which defendants allegedly carried out their fraudulent scheme — i.e., the alleged written and oral misrepresentations. The alleged written misrepresentations involve 29 separate works attributed to Salvador Dali and are detailed on pages 16 through 32. Although these pages set forth the substance of the government's allegations, they do not identify the particulars of to whom, by whom, and when the alleged misrepresentations were made. On pages 32 through 43, the indictment similarly outlines the oral misrepresentations that allegedly were made in furtherance of the fraudulent scheme — these oral misrepresentations involve 22 separate Dali works. The mail fraud counts, counts 1 through 77, are next presented on pages 44 through 49 of the indictment. Each count briefly sets forth a mailing "in furtherance of the scheme" in the following manner: 1) the date of the mailing; 2) the victim of the mailing; 3) the sender (i.e., Center Art); and 4) the type of document involved. In similar brief fashion, the indictment outlines the allegations of wire fraud, counts 78 through 84, on pages 49 and 50. Finally, the indictment introduces the securities fraud scheme on pages 50 and 51, and then lists the securities counts, counts 85 through 93, on pages 52 and 53. Again, the indictment merely lists the date, victim,

sender and document at issue in each count; no further definition or substance is provided.

Defendants first ask the court to dismiss their indictment in its entirety pursuant to Fed. R. Crim. P. 12(b) on the following grounds:

1. Prejudicial preindictment delay in violation of defendants' Due Process rights;

2. prejudicial preindictment publicity which deprived defendants of their constitutional right to an unbiased grand jury;

3. evidence presented to the grand jury was tainted fruit of the illegal search;

4. federal fraud laws do not extend to lawful conduct not prohibited by Hawaii's Fine Print laws — thus, the indictment violates the defendants' Due Process rights to fair notice that such conduct was illegal;

5. fraud charges may not be premised on "material omissions" in the absence of a fiduciary relationship not present here;

6. the securities fraud charges (counts 85 through 93) are defective in that "art reproductions" do not constitute "securities" under the federal securities law;

7. the indictment fails to enable the defendants to adequately prepare their defense, fails to ensure that defendants would only be convicted upon facts found by the grand jury, and fails to protect the defendants from double jeopardy;

8. grand jury materials were disclosed to private parties in violation of Federal Rules of Criminal Procedure 6(e);

9. the process by which the grand jury was selected and composed violated constitutional and statutory rights; and

> 10. the government's use of hearsay based opinion evidence in place of Dali's testimony on critical fact issues before the grand jury violated the defendants' Due Process rights.

Defendants' Corrected Memorandum at 1-2.

Second, defendants ask the court for the following relief pursuant to Fed. R. Crim. P. 12(b) and 41(e):

> 1. To suppress the government's trial evidence on the ground that it constitutes tainted fruit of an illegal search and seizure; and
>
> 2. to effect the return of all art work (excepting those Dali art reproductions referred to in the search warrant affidavit) seized during the course of the April 15, 1987, search and seizure or produced pursuant to subsequent grand jury subpoenas issued to Center Art, on the grounds that (a) there was insufficient probable cause to warrant the original search and seizure, (b) the subpoenaed art work was tainted fruit of the illegal search and seizure, and (c) the bulk of the art work is not named in the indictment and the government's retention of this valuable property violates the defendants' constitutionally protected rights to Due Process of law and freedom of expression.

Id. at 2-3. These Rule 12(b) and 41(e) motions relate to previous suppression order issued by Judge Rafeedie, which order was recently affirmed by the Ninth Circuit Court of Appeals.

Third, pursuant to Fed. R. Crim. P. 16. *Brady v. Maryland,* and its progeny, defendants move to obtain discovery and inspection of specific materials which the government arguably has declined to provide. Fourth, defendants move for a bill of particulars pursuant to Fed. R. Crim. P. 7(f). Fifth, defendants move for the disclosure of grand juror

selection records pursuant to 28 U.S.C. § 1867(f) and *Test v. United States*. Sixth, pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i) and (ii), defendants seek production and review of the grand jury transcript on "particularized need." Finally, pursuant to Fed. R. Crim. P. 16(a)(1), defendants ask this court to require the government to specify, no later than 60 days prior to trial, which documentary evidence it intends to introduce at trial.

The court first addresses the various motions to dismiss pursuant to Fed. R. Crim. P. 12(b) and then reaches the various production requests. The court reserves defendants' motion for a bill of particulars for the end of its lengthy analysis. With regard to defendants' motions to suppress, the court will issue a separate order following the submission of additional papers by the parties on September 11, 1989.

DISCUSSION

I. MOTIONS TO DISMISS PURSUANT TO RULE 12(b)

A. Prejudicial Pre-Indictment Delay:

Defendants urge this court to dismiss all charges against them on grounds of prejudicial preindictment delay, which delay arguably has violated their Fifth Amendment rights to due process. *See U.S. v. Sherlock*, 865 F.2d 1069, 1073 (9th Cir. 1989). Defendants contend that the government delayed eleven years prior to filing its indictment, after having initiated its criminal investigation of Center Art in 1979. In this way, the government has impinged on their ability to effectively defend themselves against the charges they now face. According to the defendants, the government's fraud charges are premised on alleged misrepresentations concerning the works of Dali, which artworks were acquired by Center Art in the late 1970s and early 1980s. Because most of these allegedly fraudulent sale transactions

occurred more than five years ago, defendants contend that they will be severely handicapped at trial "by the natural but inevitable loss of relevant witnesses, material documents, and basic memory . . . of events and conversations that transpired years ago." Defendants' Corrected Memorandum at 17-18. Of utmost concern to defendants is the fact that "[w]hile the Government dallied, two crucial witnesses died," *id.* at 24, — Salvador Dali (whose works are the focus of this criminal action) and Leon Amiel (who was one of Center Art's primary lithographers in the late 1970s and early 1980s).

The Ninth Circuit Court of Appeals in *Sherlock* recently reiterated the relevant two-prong test to be used to address charges of excessive pre-indictment delay. *See id.* at 1073. For defendants to succeed on such motions, they must satisfy both of the following elements to this test:

> First, [defendants] must prove they suffered actual, non-speculative prejudice from the delay. [citations omitted].
>
> Second, they must show that the delay, when balanced against the prosecution's reasons for it, offends those "fundamental conceptions of justice which lie at the base of our civil and political institutions." [citations omitted].

Id. See also U.S. v. Valentine, 783 F.2d 1413, 1416 (9th Cir. 1986). Scrutinizing the record before it, the court finds that defendants cannot satisfy either of these two essential prongs.

In order to satisfy the "actual, non-speculative prejudice" prong of this two-part test, defendants rely primarily on the fact that two crucial witnesses have recently died — artist Salvador Dali on January 23, 1989, and lithographer Leon Amiel in October of 1988. According to defendants, they are now confronted with a situation where the government will rely on purported experts to identify whether Dali signed, approved, or participated in the lithographs at issue. Defend-

ants contend that this fact alone warrants dismissal of the indictment, since "Mr. Dali was the best possible witness to confirm and support the fact that he did authorize and sign the lithographs at issue." Defendants' Corrected Memorandum at 25.

Similarly, defendants claim that lithographer Leon Amiel, a primary source for Center Art's graphics in the late 1970s and early 1980s, was also an essential witness as to the authenticity of the Dali artwork provided to Center Art. His recent death has also left defendants bereft of testimony which cannot be duplicated. However, despite relying primarily on the death of these two "crucial" witnesses, defendants contend that perhaps the greatest prejudice arises from the fact that the important events and conversations took place so long ago. In defendants' words, the prejudice they face "in having to reconstruct the relevant events and conversations more than five years ago are [sic] enormous and likely insurmountable." *Id.* at 26.

Although the court recognizes the difficulties inherent in the facts surrounding this case, defendants' claims of lost testimony are insufficient to warrant dismissal of the indictment. The Court of Appeals for the Ninth Circuit has emphasized that "protection from lost testimony generally falls *solely* within the ambit of the statute of limitations." *U.S. v. Moran,* 759 F.2d 777, 782 (9th Cir. 1985), *cert. denied,* 106 S.Ct. 885 (1986) (emphasis added). *See also Sherlock* at 1074. The court in *Moran* specifically "questioned whether such lost testimony would ever qualify for the level of prejudice necessary to establish a due process violation." *Moran* at 782. *See also Sherlock* at 1074; *U.S. v. Loud Hawk,* 816 F.2d 1323, 1325 (9th Cir. 1987) ("[t]he task of establishing such prejudice is so heavy that we have found only one case since 1975 where a Court of Appeals has upheld a due process claim"). In this case, all specific acts of mail, wire, and securities fraud fall within the

relevant five year statute of limitations period. *See* 18 U.S.C. § 3282. The essence of the government's case — the alleged misrepresentations concerning Dali artwork — is not dependent on Dali testimony.

Furthermore, the prosecution suggests that both Dali and Amiel are now unavailable to testify at trial for reasons completely independent of any delay on the government's part. Specifically, the government contends that Dali was physically unable to leave Spain since 1981 due to his poor health, and Amiel was already involved in a separate criminal investigation in New York and may have invoked his Fifth Amendment privilege in this trial. *See U.S. v. Stone.* 319 F. Supp. 364, 367 (E.D. Cal. 1970) (the court found no pre-indictment delay for similar reasons). Defendants' efforts to refute these allegations, in their untimely-filed reply memorandum, are of questionable merit. Defendants' exhibits, rather than portray Dali as a "picture of health" prior to his death, reveal that the artist was indeed very ill. Although possibly mentally sharp up to that time, Dali clearly was physically weak — he had been bedridden and fed "through a tube in his nose" for a number of years. *See* Defendants' Reply Memorandum, Exhibits 1, 13. Dali also expressly refused to meet with a government agent who had traveled to Spain in 1988.

With regard to Amiel, Arnold J. Ross ("Ross"), the printer's attorney, now cannot testify for his deceased client via affidavit. Thus, Ross' affidavit testimony, which states that Amiel would not invoke his Fifth Amendment privilege in this matter if he were alive today, is entitled to no weight whatsoever. *See* Affidavit of Arnold J. Ross. Furthermore, Amiel apparently also suffered from severe health problems prior to his death.

In any event, defendants were just as able to preserve the testimony of both Dali and Amiel by means of deposition as was the government, since they concede that they had

expected the indictment's return since 1987. *See U.S. v. Alderdyce,* 787 F.2d 1365, 1370 (9th Cir. 1986) (for similar reasons, the court rejected a similar attempt by the defense to shift all blame for "lost" evidence onto the government). All blame cannot be foisted upon the government.

Finally, much like the situation in *U.S. v. Mays,* defendants have proffered little *evidence* as to the nature of this "lost" Dali and Amiel testimony. *See id.,* 549 F.2d 670, 679 (9th Cir. 1977) (the court remanded the case to the trial court in order to conduct a new inquiry as to actual prejudice). Thus, there is simply no way of knowing how they would have testified at trial. Defendants' only offer of proof in this regard is the following: 1) an alleged contract signed by Dali which gave Center Art the "exclusive rights of lithographic reproduction" to *three* specific artworks; 2) a letter by Dali's American attorney to an alleged "victim" which states that Center Art had produced "*one* authorized edition" of the work "Lincoln in Dalivision" in the late 1970s; and 3) the affidavit testimony of Ross, who again speaks for his deceased client Amiel, and states that "Mr. Dali entered into contracts with Mr. Amiel authorizing Mr. Amiel to publish a number of editions of Dali lithographs." Defendants' Reply Memorandum, Exhibits 4, 6, Affidavit of Arnold J. Ross. Such limited arguable "proof" of authenticity is insufficient to infer a complete absence of fraud as to the remaining Dali works which constitute the bulk of this prosecution. This is especially the case, given the fact that the government has introduced affidavits by Dali himself which support its claims of fraud. Government's Further Opposition Memorandum, Exhibit 1. To accept defendants' exhibits as proof as to how Dali and Amiel would testify on all other matters charged in the indictment. would be to resort to extrapolation bordering on pure speculation.

Speculation of this kind is insufficient to show prejudicial pre-indictment delay for the following reasons stated in *Mays*:

> As it stands now, a trier of fact might as well assume that the decedents would have placed *all* of the blame on the defendants, as to assume that they would have *exonerated* them. In either case, the conclusions appear to us as mere speculation, which cannot serve as the grounds for a finding of actual prejudice.

Id. at 680 (emphasis added) (in this case, defendants claimed actual prejudice caused by the deaths of *three* material witnesses and, yet, their argument was rejected). Defendants cannot show in a "definite and not speculative" manner how the "lost" testimony will prejudice their case, since this testimony need not be exculpatory in nature. The use of expert opinion testimony on the issue of authenticity, therefore, is not unduly prejudicial in itself. Experts frequently testify as to the authenticity of artworks where artists become unavailable to verify their works themselves. Defendants' own exhibit acknowledges this fact by recognizing the existence of *several* experts qualified to determine the authenticity of *Dali* art. *See* Defendants' Reply Memorandum, Exhibit 6.

For similar reasons, defendants' claim of prejudice due to faded memories of witnesses is also unpersuasive. Defendants fail to indicate in a "definite and not speculative" manner how live witnesses would testify had their memories not dimmed. *See, e.g., Mays* at 680 ("there is a distinction to be made between a mere claim of dimmed memories and proof that the memories of witnesses have indeed been impaired by the passage of time"); *Sherlock* at 1074. In fact, the record is completely void of anything other than general claims of prejudice in this regard. Citing to an example taken from defendants' brief, the court notes that bare allegations are insufficient to raise an inference of

actual prejudice: "[o]ne must necessarily question the reliability of anyone's recollection as to what was said during the purchase of artwork or anything else that long ago." Defendants' Corrected Memorandum at 26. Moreover, the fact that most of the subject transactions are supported by documentary evidence obviates much of these concerns. Prong one of the *Sherlock* test has not been satisfied.

Defendants also fail to satisfy the second prong of the relevant *Sherlock* test. Defendants have failed to make the requisite showing that government "culpability" led to any delay in issuing the indictment. *Sherlock* at 1074. *See also Mays* at 678 (aside from actual prejudice, defendants' also must show some culpability on the government's part "either in the form of intentional misconduct or negligence"). The record is barren of any evidence indicating that the government waited until January 26, 1989, to issue its indictment in order to gain a tactical advantage. *Accord Sherlock* at 1074. Rather, the record reveals that the government acted reasonably, given the pervasive scope of the alleged art fraud and given the ongoing nature of the criminal investigation. *See id.* The government, in fact, indicates that additional victims are coming forward even at this time.

Merely because the Hawaii State Attorney General's Office contemplated its own criminal action in 1981 does not alter the court's conclusion. Because of the dual sovereignties involved in the two separate criminal investigations, the state's delay and failure to indict should not be charged to the federal investigation. *See U.S. v. Cordova*, 537 F.2d 1073, 1076 (9th Cir. 1976), *cert. denied*, 97 S.Ct. 385 (1976) (the court concluded that an arrest by state officers was "irrelevant" to similar charges found in a federal indictment, because "separate sovereignty allows both prosecutions;" moreover, the court expressly contemplated the instant context, since it recharacterized defendant's argu-

ment as being one of pre-indictment delay). *Cf. U.S. v. Wheeler*, 98 S.Ct. 1079, 1082-83 (1978). In the absence of any evidence showing that the state's investigation was used merely to restrain defendants' activities until the federal government chose to prosecute, the court rejects defendants' sweeping argument that this case was already six years old by the time the first federal agent commenced investigation. *See Cordova* at 1076 (court notes the relevance of this factor of collusion). Defendants would have their case barred by the statute of limitations before federal authorities had even entered the scene. Defendants' efforts to distinguish *Cordova* are completely disingenuous, given the fact that the "dual sovereignties" doctrine was said to directly apply to Fifth Amendment issues of pre-indictment delay in that case. *See id.*

Defendants themselves concede that the federal criminal investigation only commenced in early 1986. Given the extensive nature of the alleged fraud being perpetrated by defendants, as well as the numerous victims involved, the two and one-half year period from investigation to indictment is inherently reasonable. Courts should not fault the government for making thorough investigations before concluding that persons connected with a business the size of Center Art have defrauded investors. *See U.S. v. Livengood*, 427 F.2d 420, 422 (9th Cir. 1970) (the court here rejected the defendants' argument of pre-indictment delay, despite the fact that the indictment was secured *more than three years* after the federal investigation had arguably commenced).

Unlike the situation before the court in *Mays*, the last overt criminal acts alleged in this indictment occurred within months of the indictment's return. *Contra Mays* at 678 (the court found *evidence* of pre-indictment delay in the fact that the period between the last overt act alleged and the indictment's return was four and one-half years; nevertheless, the court remanded for further investigation into the

matter by the trial court). Furthermore, the government here proffers evidence showing that its agents worked diligently on this criminal matter around the globe in the two and one-half year interim; witnesses were contacted in such distant places as Scotland, Switzerland, Spain and Vatican City. *Contra id.* at 679 (the government failed to proffer such relevant evidence). Finally, defendants waited nearly nine months to challenge the propriety of the government's April 15, 1987 search and seizure. Once defendants' motion to suppress was granted, the government's case certainly required reevaluation and restructuring. For all these reasons, defendants have also failed to satisfy the second prong of the relevant *Sherlock* test; the court finds no evidence of negligence or bad faith on the part of the government in the prosecution of this case. Thus, defendants' motion to dismiss the indictment on grounds of prejudicial pre-indictment delay is DENIED.

B. Prejudicial Pre-Indictment Publicity:

Without providing the court any authority to do so, defendants ask this court to dismiss the indictment on grounds of prejudicial pre-indictment publicity. Defendants contend that the massive publicity surrounding their case has robbed them of their right to have the allegations of fraud considered by an unbiased grand jury as guaranteed by the Fifth Amendment. In this way, the indictment is arguably fatally tainted. In the alternative, defendants ask this court to conduct a hearing — i.e., a type of post-indictment voir dire of the grand jurors — to determine the extent to which those grand jurors were exposed to and affected by such publicity. According to defendants, "[t]he grand jurors should be questioned, as petit jurors would be." Defendants' Corrected Memorandum at 50. In support of their claims of inherent bias, defendants have attached local newspaper clippings which illustrate the tremendous media coverage and interest that have been generated by this matter since

the initial search of Center Art's four galleries on April 15, 1987.

Defendants also ask for a hearing on the matter in order to establish *possible* improprieties on the part of the government in its handling of the grand jury proceedings. According to defendants, they "*must* be given [this] opportunity to demonstrate prejudice of the grand jury." Defendants' Corrected Memorandum at 49 (emphasis added). In essence, defendants suggest that government agents violated the grand jury secrecy rules found in Fed. R. Crim. P. 6(e) by unlawfully disseminating privileged information to the press. *See* Defendants' Corrected Memorandum at 44 n.5. Specifically, defendants contend that secret court filings were included in local media reports, as were interviews by various grand jury witnesses. Furthermore, defendants note that the government refused to seal all papers and hold their previous Rule 41 motion *in camera* in December of 1987.

In response to the initial argument which seeks the indictment's dismissal, the court finds that defendants cannot meet their heavy burden to justify such drastic relief. *See U.S. v. Navarro-Ordas*, 770 F.2d 959, 968 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 1200 (1986) (noting this heavy burden borne by defendants). Defendants simply proffer no authority authorizing this court to dismiss their indictment solely on grounds of pre-indictment publicity. Analogizing such prejudicial media reporting to prosecutorial misconduct does not help defendants' position, because the government is not responsible for the media's behavior in relation to the grand jury process; the media's legal obligations are entirely separate and independent from those of the government. Thus, the unpublished *U.S. v. Hill* case heavily relied upon by defendants is inapposite to the case at bar. *See id.* S 88 Cr. 154 (MJL) (S.D.N.Y. 1989). *See also U.S. v. Whitted*, 325 F. Supp. 520 (D. Neb. 1971), *rev'd on other grounds*, 454 F.2d 642 (8th Cir. 1972)

(inapposite because prosecutorial misconduct was at issue); *U.S. v. DiGrazia*, 213 F. Supp. 232 (N.D. Ill. 1963) (also inapposite for the same reason). Absent evidence in the record indicating government violations of Fed. R. Crim. P. 6(e), this court must conclude that the publicity engendered by this case in its pre-indictment stage was both "natural and inevitable." *U.S. v. Bally Manufacturing Corp.*, 345 F. Supp. 410, 420 (E.D. La. 1972). Even massive publicity, in and of itself, is insufficient to cast doubt on an indictment's validity. *See id.*

Defendants' Rule 6(e) argument is similarly flawed. In order for this court to grant defendants' request for a hearing as to possible governmental violations of the grand jury secrecy requirement, they must first make out a prima facie case that such violation had occurred. *See In re Grand Jury Investigation (Lance)*, 610 F.2d 202, 221 (5th Cir. 1980). Thus, because they carry this initial burden, defendants cannot contend that they "must be given the opportunity to demonstrate prejudice of the grand jury." Courts place this burden on defendants, because such hearings are not to be lightly granted. *In re Hunter*, 520 F. Supp. 1020, 1022 (W.D. Mo. 1981), *aff'd*, 673 F.2d 211 (8th Cir. 1982) (in the similar pre-indictment publicity context). When determining whether parties, who allege violations of Rule 6(e) based upon news media reports, have established a prima facie case, courts must consider the following factors:

1. Whether the media reports clearly indicate the disclosure of information concerning matters occurring before the grand jury;

2. whether the source of the grand jury information is indicated to be one of those proscribed by Rule 6(e);

3. whether the nature of the relief requested is reasonable, and the extent to which that relief interferes with the grand jury process; and

4. whether the government has proffered evidence to rebut the defendant's allegations that a Rule 6(e) violation has, in fact, occurred.

See In re Grand Jury Investigation (Lance) at 216-20.

In this case, defendants cannot satisfy any of the above salient factors. With regard to the test's first prong, the court initially notes that its independent review of the newspaper articles offered as exhibits does not reveal the presence of any information obtained in secret court filings. Second, given the fact that Judge Holland rejected defendants' attempt to hold its prior Rule 41 motion *in camera*, it certainly was not improper for the government to object to the defendants' request — these hearings are presumptively open to the public. Third, Rule 6(e) does not prevent disclosures by witnesses who testify before grand juries. *E.g., U.S. v. Sells Engineering, Inc.*, 103 S.Ct. 3133, 3138 (1983): *In re Grand Jury Investigation (Lance)* at 217. As to the second prong of the above test, the court notes that its independent review of the attached exhibits does not indicate that *any* of the information was obtained from government sources. *Contra, e.g., In re Grand Jury Investigation (Lance) at 220*; *Barry v. U.S.*, 865 F.2d 1317, 1325 (D.C. Cir. 1989). Unlike the newspaper exhibits proffered into the record in *Lance* and *Barry*, none of the articles submitted here allude to "government sources" in any way.

The court next finds that the type of relief requested by defendants — i.e., post-indictment "voir dire" of the grand jurors — is also unprecedented. Thus, the relevant third prong also rebuts their position. *See Bally Manufacturing Corp.* at 421 (the court summarily denied defendants' similar request for post-indictment examination of individual grand jurors, which request also was made to discern the effects of pre-indictment publicity; the court noted that movants had "no specific or actual basis" to make such a request). Defendants rely solely on an unpublished opinion

to support their unusual request for post-indictment voir dire. *See In re Grand Jury Investigation (Biaagi)*, 1987 WL 8073 (E.D.N.Y. 1987). Aside from being unpublished, defendants' authority is also inapposite for numerous reasons. First, unlike the situation now facing the court, the government in *Biaggi* conceded that a Rule 6(e) violation had occurred — none has been shown here. Second, and even more importantly, the judge in *Biaggi* was logistically able to voir dire the grand jurors on the matter because the indictment had yet to be issued — in this case, on the other hand, the grand jury has long since disbanded, so that voir dire is practically unworkable. Such voir dire could also impose a "chilling effect" on the independent operation of grand juries.

Finally, with regard to the fourth prong of the *Lance* test, the government's supervising attorney, Leslie Osborne, has attached an affidavit to the record (Government Exhibit 5) which asserts *under oath* that neither he, nor any of the other assistant U.S. Attorneys, disclosed any secretive grand jury information to the press. *Contra In re Grand Jury Investigation (Lance)* at 220 (the court noted the significance of the government's failure to attach such an affidavit to the establishment of a Rule 6(e) prima facie case). The government's denial of misconduct is entitled to great weight. *See id.* at 214-16 (the court analyzed many of the same cases relied upon by defendants and concluded that government denials of misconduct were often dispositive of the issue).

Because defendants have failed to establish a prima facie case of governmental misconduct related to the grand jury's operation, no evidentiary hearing of any kind is warranted. *See Navarro-Ordas* at 968. *Contra, e.g., Barry* at 1325 (the defense had already established a prima facie case): *U.S. v. Eisenberg*, 711 F.2d 959, 963 (11th Cir. 1983) (same). Moreover, even if breaches of Rule 6(e) did occur in this

case, such disclosures could not have affected the grand jury's charging decision in any way, and the indictment would not be dismissed; the grand jury already necessarily would be privy to such matters. *See Bank of Nova Scotia v. U.S.*, 108 S.Ct. 2369, 2376 (1988). For the foregoing reasons, the court DENIES defendants' motion to dismiss the indictment on grounds of prejudicial pre-indictment publicity. The court also DENIES defendants' alternative request for an evidentiary hearing on the matter, which hearing would include post-indictment voir dire of the grand jurors.

C. Defective Theories of Fraud:

Defendants next ask this court to dismiss the indictment in its entirety, or at least certain portions of it, on grounds that the government's two primary prosecutorial theories are insufficient to support federal fraud charges. In essence, defendants' instant motion is analogous to civil motions to dismiss for failure to state a claim upon which relief can be granted. Defendants summarize the government's two alleged theories in the following way. Under the first theory, defendants are charged with having made false or fraudulent statements with regard to the "originality" of certain Dali artworks; defendants' artworks apparently did not conform to the government's arbitrary definition of the term "original." Pursuant to the second theory, defendants are charged with alleged fraudulent omissions of material fact, which include "failing to disclose to their customers the amount Center Act paid to acquire the artwork, the amount Center Art received from suppliers for returned items, and the fair market value of the artwork." Defendants' Corrected Memorandum at 53.

Defendants challenge the sufficiency of the government's first theory by asserting that their "alleged conduct in referring to certain artwork as 'original' does not contravene

the specific Hawaii law which regulates the sale of fine prints." *Id.* at 52. *See also* Defendants' Reply Memorandum at 27 ("[t]he government creates a new crime by its indictment, labeling as criminal fraud the representation that artwork is 'original' if it does not conform with the Government's definition of what 'original' should mean"). Defendants offer a lengthy account of the legislative history and state application of that arguably relevant statute to bolster their argument that "originality" does not require a work to have been "drawn by the hand of the artist to whom the work is ascribed." Defendants' Reply Memorandum at 29. However, defendants fail to point out that the government apparently based its definition on that used by defendants themselves in their sales brochures. In its indictment, the government argues that defendants failed to conform to *their own definition* of the word "original," which definition was used to entice customers.

Even more significant. however, is the fact that the specific Hawaii statute to which defendants refer, *Haw. Rev. Stat.* § 481F, is inapposite in the instant federal context. Under the "dual sovereignties" doctrine, state criminal actions are "irrelevant" to federal criminal prosecutions — "separate sovereignty allows both prosecutions," one or the other, or neither prosecution. *Cordova* at 1076. *Cf. Wheeler* at 1082-83. Thus, if the indictment sufficiently charges violations of *federal* law, it cannot be dismissed on the basis of defendants' state-based argument. Furthermore, defendants' argument is completely unworkable at this point, since they themselves concede that they "are currently unable to determine which counts of the indictment are invalid because of the aforementioned defect." Defendants' Reply Memorandum at 31 n. 3.

Given these deficiencies in defendants' first argument, the court concludes that the material acts assigned to defendants in the indictment are sufficient to withstand their

instant motion to dismiss. Defendants have been properly charged with having committed affirmative acts of mail fraud (18 U.S.C. § 1341), since the following requisite elements of that federal offense have been satisfied by the pleadings:

> 1. [D]efendant[s] devised a scheme or artifice to defraud;
>
> 2. defendant[s] used the mails in furtherance of the scheme: and
>
> 3. defendant[s] did so with the specific intent to deceive or defraud.

Sun Savings & Loan Association v. Dierdorff, 825 F.2d 187, 195 (9th Cir. 1987). *See also Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400 (9th Cir. 1986).

The scheme to defraud is outlined in great detail in pages 6 through 44 of the indictment. *See U.S. v. Mitchell*, 867 F.2d 1232, 1233 (9th Cir. 1989) ("[t]o charge a scheme to defraud under section 1341, [the Supreme Court] requires that the [defendant] intended to deprive the [victim] of money or property"). Seventy-seven specific uses of the mails in furtherance of that scheme are set forth in counts 1 through 77 of the indictment, which counts are found on pages 44 through 49. *See. e.g., U.S. v. Mitchell*, 744 F.2d 701, 703 (9th Cir. 1984) (to violate the mail fraud statute, "mailings need not be an essential part of the scheme, but they must be made or caused to be made for the purpose of executing the scheme"); *U.S. v. Dadanian*, 818 F.2d 1443, 1446 (9th Cir. 1987), *mod. on other grounds*, 856 F.2d 1391 (9th Cir. 1988) ("so long as one participant in a fraudulent scheme causes a use of the mails in execution of the fraud, all other knowing participants in the scheme are legally, liable for that use of the mails"): *U.S. v. McDonald*, 765 F.2d 1350, 1359-60 (9th Cir. 1978), *cert. denied*, 99 S.Ct.

105 (1978) (the defendant himself need not have actually done the mailing; all that is required is that there is some "reasonably forseeable use of the mail"). Finally, the indictment expressly alleges that defendants conducted their scheme with the requisite specific intent to deceive or defraud, despite the fact that such specific intent need not be plead and may be inferred by the indictment itself. *See, e.g., Sun Savings & Loan Association* at 196; *Schhreiber Distributing Co.* at 1400. *See also Schmuck v. U.S.*, 109 S.Ct. 1443, 1453 (1989) (the Court dispenses with the third prong altogether). The mail fraud counts are sufficiently plead. *See U.S. v. Ferrara*, 701 F. Supp. 39, 44 (E.D.N.Y. 1988). *aff'd without op.*, 868 F.2d 1268 (2d Cir. 1988) (the court upheld allegations of mail fraud that were set forth with Much less particularity than those now at issue).

The court similarly finds that defendants have been properly charged with acts of federal wire fraud (18 U.S.C. § 1343). The elements of federal wire fraud are directly analagous to those of mail fraud:

1. [D]efendants participated in a scheme to defraud;

2. which scheme made use of the wires in furtherance of its goals; and

3. defendants had a specific intent to deceive or defraud.

U.S. v. Bonallo, 858 F.2d 1427, 1433 (9th Cir. 1988). As noted above, the government's indictment satisfies the first and third elements of the federal offense. Moreover, the specific uses of the wires in furtherance of the allegedly fraudulent scheme are set forth in counts 78 through 84 of the indictment, which counts are found on pages 49 and 50.

Defendants, however, also argue that they had no duty to make certain disclosures relating to the true worth of the artwork, because no fiduciary relationship existed between them and their customers. Thus, defendants contend that the instant charges of fraud unlawfully hold them criminally

responsible for omissions; such prosecution arguably violates defendants' "fundamental due process rights to fair notice that their conduct was illegal." Defendants' Corrected Memorandum at 53. Defendants correctly assert that *non-disclosures* can form the basis of federal mail and wire fraud "only where there exists an independent duty (either fiduciary or derived from an explicit and independent statutory requirement) and such duty has been breached." *U.S. v. Dowling*, 739 F.2d 1445, 1450 (9th Cir. 1984), *rev'd on other grounds*, 105 S.Ct. 3127 (1985). *See also California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1472 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 698 (1988). *Cf., e.g., Chiarella v. U.S.*, 100 S.Ct. 1108, 1115 (1980) (in the securities context); *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 287 (9th Cir. 1988) (in the context of a contractual agreement to arbitrate).

However, the record reveals that defendants' alleged fraudulent activity, rather than being constructive in nature, was entirely active so that the *Dowling* case does not apply. In essence, the government's prosecution is based on affirmative misrepresentations made to purchasers of Dali art, not on omissions. *Accord U.S. v. Benny*, 786 F.2d 1410, 1418 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 668 (1986) (the court addressed similar arguments in the mail fraud context). This being the case, the government may seek the instant convictions for mail and wire fraud without any additional proof of a fiduciary duty. *Id.* The indictment is replete with allegations of affirmative misrepresentations regarding the worth of Dali art. Representations of artwork having a value of "X" to induce sales when, in fact, the artwork's fair market value is actually "1/10 X," certainly qualify as active fraud — these are not merely omissions. Such misrepresentations actually deprive victims of money or property. *See Mitchell*, 867 F.2d at 1233. Because the

government's indictment is styled in this way, it properly charges fraud.

For these reasons, defendants' arguments of insufficient notice of criminal culpability are inherently incredible. Defendants cannot seriously argue that such behavior, if intended to induce monetary or property loss, is not actionable. As the Ninth Circuit Court of Appeals has observed:

> Fraudulent schemes include those that are "contrary to public policy or which fail to measure up to the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of the society.' " [citations omitted].

U.S. v. Buckley, 689 F.2d 893, 897 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 1778 (1983) (the court concluded that the government had adequately alleged a scheme to defraud within the meaning of the mail fraud statute). The court finds that defendants' alleged fraudulent behavior, if true, certainly satisfies the *Buckley* definition — fraud is dependent on a culpable "state of mind." Defendants' motion to dismiss the indictment on these grounds, therefore, is DENIED. Because the government concedes that defendants had no obligation to inform their customers of the cost of acquiring the Dali artworks from wholesalers, however, it may offer evidence only of affirmative misrepresentations at trial.

D. Failure to State Claims of Federal Securities Fraud:

Defendants are also charged with having violated the federal securities law with their allegedly fraudulent scheme. Counts 85 through 93 allege fraud in relation to the sale of "relatively worthless art reproductions" which are said to be "the securities." Indictment ¶ 15, at 50-51. Defendants move to dismiss these federal securities counts for the following simple reason: art reproductions arguably are not

"securities" within the meaning of the securities law. Defendants assert that mere allegations of art reproductions having "investment value" do not transform those artworks into securities. Defendants' Corrected Memorandum at 68. To counter defendants' argument, the government contends that "the evidence at trial will meet the [relevant] test" to support its charges. Government's Memorandum at 39.

The court first looks to the statutory definition of "security" itself in order to resolve the instant motion. The Securities Act defines this term in the following manner:

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, *investment contract*, voting-trust certificate, certificate of deposit for a security, factional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group of index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. § 77b (emphasis added). From the above definition, the court observes two things: 1) the statutory definition of "security" is highly specific and particularized; and 2) within this meticulous definition, there is no mention of art reproductions or artwork of any kind. Thus, at least at first blush, defendants' argument seems to be correct — the alleged fraudulent scheme apparently falls outside the aegis of the securities laws.

Nevertheless, the government argues that the retail sales of art reproductions qualify as "investment contracts" under the securities law and, therefore, fall within the ambit of that law's protections. The Ninth Circuit Court of Appeals, having recently addressed this issue of whether a particular investment contract qualifies as a "security" within the meaning of the Securities Act, concluded that courts must focus on the economic realities of the underlying transaction when reaching their conclusions. *See U.S. v. Kessi*, 868 F.2d 1097, 1103 (9th Cir. 1989) (the court addressed whether alleged "commodities" also qualify as "securities"). In considering such economic realities, courts must focus on the following three-prong test which, if satisfied, transforms an "investment contract" into a "security":

1. There must be an investment of money;

2. in a common enterprise; and

3. an expectation of profits from the managerial efforts of others.

See id. See also Securities and Exchange Commission v. W.J. Howey Co., 66 S.Ct. 1100, 1104 (1946) (the seminal case that first established this three-part test). Conceding that the sale of art reproductions involves an "investment of money," defendants challenge only the government's ability to satisfy prongs two and three.

Defendants first argue that the "common enterprise" prong is plainly lacking in this case, because the alleged fraud "involves only sales of art work [sic] to retail customers" — i.e., there is no element of interdependence. Defendants' Corrected Memorandum at 70. Within the relevant statutory framework, "common enterprises" are those in which the " 'fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment of third parties.' " *Nakagawa v. Ellis & Ellis Associates, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 93,028 (D.

Haw. 1986) (Fong. C.J.), *quoting S.E.C. v. Goldfield Deep Mines Co.*, 758 F.2d 459, 463 (9th Cir. 1985) (the case involved stamp master leases). Within the Ninth Circuit, the government must only make a showing of "vertical commonality," which is present if the success or failure of the investors is linked with the success or failure of the promoters. *Id. See also Stenger v. R.H. Love Galleries, Inc.*, 741 F.2d 144, 147 (7th Cir. 1984) (the court found no vertical commonality in this case and dismissed the securities counts which were based on the allegedly fraudulent sale of paintings); *Mordaunt v. Incomco*, 686 F.2d 815, 817 (9th Cir. 1982), *cert. denied*, 105 S.Ct. 801 (1985) (the court held that discretionary commodities trading accounts were not "common enterprises," because vertical commonality was lacking). No "pooling" of investors' funds, or "horizontal commonality," need be shown. *See Nakaqawa* at ¶ 93,028.

Because the success and failure of the individual investments in Dali art reproductions are not materially linked to the success and failure of defendants' business, the court finds no "vertical commonality" and, thus, no "common enterprise." The government, therefore, cannot establish the presence of an "investment contract" within the meaning of the Securities Act, and counts 85 through 93 must be dismissed. The court adopts the following reasoning of the *Stenger* court:

> In the case before us the fortunes of [the investors] and defendants are unrelated. [The investors' art reproductions] may appreciate and [they] [are] free to sell them through any means [they] wish[]: defendants would not share in any profit. Conversely, defendants would receive a sales commission if [the investors] sell[] [their art reproductions] through defendant [Center Art], even if [they] sell[] them at a loss . . . [The investors] do[] not share in any profit made on

> appreciation of the new [art reproduction] before [they] buy[ ] it, and [defendant[s] do[ ] not share in any appreciation in value after [the investors buy[ ] the new [art reproduction]. This relationship is no different than that found in a typical commodities brokerage account, in which the broker profits from commissions while the investor profits from appreciation.

Id. at 147. *See also Mordaunt* at 817 (the court uses similar reasoning to conclude that discretionary commodities accounts do not constitute "common enterprises"); *Nakagawa* at ¶ 93,028 (investors "had the duty to decide how to exploit the stamp masters, how to distribute the stamps, and how to produce [their] own profit without the assistance of [the promoter]"). Merely because the government alleges that the investors relied upon Center Art to maintain the "integrity" (i.e., apparently the value) of the Dali artwork does not alter this result. Neither does the fact that defendants allegedly promised to create a resale market for the investors' art reproductions in exchange for a commission. This latter argument has already been expressly considered and rejected by the *Stenger* court. *See id.* at 145. *See also Lopez v. Dean Witter Reynolds, Inc.*, 805 F.2d 880, 885 (9th Cir. 1986) (commissions alone do not transform a discretionary commodities trading account into a "security"). Thus, the court need not even reach the relevant third prong of the "investment contract" test.

Because the government's allegations of Dali-related art fraud fail to satisfy prong two of the relevant *Kessi* "investment contract" test, those art reproductions are not "securities" within the meaning of the Securities Act. *Accord, e.g., Mechigan v. Art Capital Corp.* 612 F. Supp. 1421, 1428 (S.D.N.Y. 1985) (paintings are not securities); *Stenger* at 147 (the sale of paintings do not constitute investment contracts); *Faircloth v. Jackie Fine Arts, Inc.*, 682 F. Supp. 837, 845 (D.S.C. 1988) (the sale of art masters — i.e.,

reproduction plates — fall outside the protection of the federal securities laws); *Dahl v. English*, 578 P. Supp. 17, 20 (N.D. Ill. 1983) (the sale of original works of art in lithographic plate form do not constitute securities). *See also Art Appraisers of America, Ltd.*, Fed. Sec. L. Rep. (CCH) ¶ 80,796 (no-action letter of 1976) (the S.E.C. opined that packages of lithographs for resale were not securities). As the court did in *Mechigan*, this court refuses to expand the coverage of the securities laws in the total absence of authority to support such a result. *See id.* at 1428 (the court notes the inherent dangers and consequences of doing so). Adequate relief for the alleged fraud can be obtained via the mail and wire fraud statutes. The court, therefore, GRANTS defendants' instant motion and dismisses the securities counts — counts 85 through 93.

E. Insufficient and Defective Indictment:

Relying on their Sixth Amendment right to be informed of the nature and cause of the accusations levied against them, defendants next ask this court to dismiss the indictment in its entirety on grounds that it is fatally defective. According to defendants, the instant indictment fails to enable them to do the following:

> [T]o prepare a defense to a ninety-three count fraud indictment containing over one hundred alleged misrepresentations, pretenses and omissions that are completely unconnected to any specific count or counts, and an *unlimited* number of *unidentified* misrepresentations, pretenses and omissions that are equally unconnected to any count or counts.

Defendants' Reply Memorandum at 41 (emphasis added).

In order to withstand scrutiny, indictments must guarantee four things to defendants — i.e., must serve four purposes. The two *primary* and fundamental purposes of an indictment are the following:

1. To contain the elements of the charged crimes in adequate detail to inform the defendants of those charges: and

2. to provide adequate detail of the charged crimes to enable the defendants to plead double jeopardy in subsequent actions for similar offenses.

U.S. vs. Buckley, 689 F.2d 893, 896 (9th Cir. 1982). *cert. denied*, 103 S.Ct. 1778 (1983), *citing Russell v. U.S.*, 82 S.Ct. 1038, 1047 (1962). In addition, an indictment, two *corollary* purposes are the following:

3. To provide sufficient detail to ensure that the defendants are being prosecuted on the basis of facts presented to the grand jury; and

4. to allow courts to determine the sufficiency of the indictment.

Buckley at 896, *citing Russell* at 1047-50. Prior to trial, these latter two corollary purposes are met "if the indictment adequately informs the defendant of the charge to enable him to defend himself and plead double jeopardy" — i.e., if the two primary purposes are met. *Id.* at 896, n.3. In essence, the two corollary purposes become relevant only *after* trial, "when the theory on which the Government has obtained a conviction is clear." *Id.* Because of this distinction and the pre-trial posture of this case, the court must now only determine whether the indictment satisfies the first two fundamental purposes.

Although the indictment must sufficiently apprise defendants of the charges against them, the government need not prove its case at the indictment stage. *See id.* at 897. "The Government need not allege its theory of the case or supporting evidence." *Id.* Rather, only the "essential" facts must be identified. *Id. See also* Fed. R. Crim. P. 7(c) ("[t]he indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the

offense charged"). Moreover. the indictment should be read in its entirety, construed according to common sense and interpreted to include facts which are necessarily implied." *U.S. v. Drew.* 722 F.2d 551, 552 (9th Cir. 1983), *cert. denied,* 104 S.Ct. 2661 (1984). *See also Buckley* at 899. Because only the mail and wire fraud charges are now pending against defendants, the indictment must identify only those "essential" facts which are necessary to support those charges.

In considering defendants' prior motion to dismiss for failure to state claims of federal fraud, this court already concluded that the indictment satisfied the requisite elements of both the mail fraud and wire fraud statutes. *See Buckley* at 897-98 (the court conducted a similar analysis to uphold the validity of the indictment). The court, therefore, merely reiterates its view that the facts essential to supporting those charges have been sufficiently plead. The indictment describes in great detail the object and operation of the fraudulent scheme, the parties involved in that scheme, the material misrepresentations made in furtherance of that scheme, and the specific uses of the mails and wires in furtherance of that scheme. *See Schmuck v. U.S.,* 109 S.Ct. 1443, 1449 (1989) (the Court noted that even innocent mailings may satisfy the mailing element). *Contra U.S. v. Curtis.* 506 F.2d 985, 992 (10th Cir. 1974) (the court found the mail fraud indictment to be fatally defective, since it plead "little more than the [offense's] statutory language;" the court further noted that proper indictments should disclose the scheme's "nature" and particular false "pretenses" — that has been done in the instant case). Such detail is more than sufficient to conform to requisite minimum standards, as is evident when the court compares the instant indictment to "Official Form 3" which once served as a guide to the drafting of mail fraud indictments — this form previously was set forth in Fed. R. Crim. P. 58. *See id.* at 988 (the court discusses this form). *See also U.S. v.*

Charney, 537 F.2d 341, 352 (9th Cir. 1976), *cert denied*, 97 S.Ct. 528 (1976) (the court upheld the validity of a wire fraud indictment on a showing of much less particularity); *U.S. v. Livengood*, 427 F.2d 420, 423 (9th Cir. 1970) (the court upheld the validity of an indictment charging both mail and wire fraud, when those charges were merely "couched in the language of the respective statutes").

Nevertheless, despite the fact that the government sufficiently sets forth the facts essential to supporting the charges of mail and wire fraud, it will not be bound by those facts alone at trial. By noting that the allegedly fraudulent representations set forth in the indictment were "among others," the government has properly placed defendants on notice that additional fraudulent acts may be adduced at some later stage of litigation. *See Livengood* at 423 (the court expressly approved of such open-ended language in the indictment). The government has informed the court that its investigation is continuing.

Thus, notwithstanding defendants' argument to the contrary, the now 84 count indictment need not identify the persons who made each alleged misrepresentation, the victims of each alleged misrepresentation, and when and where each alleged misrepresentation was made. *See* Defendants' Corrected Memorandum at 83. To require the government to include all such information in its indictment would be to force it to prove its case at the pre-trial stage. Moreover, such added information would possibly render the instant indictment hopelessly prolix in violation of Fed. R. Crim. P. 7(c)(1). *Id.* ("[t]he indictment . . . shall be a plain, *concise* and definite written statement") (emphasis added). *See also Curtis* at 992 (the court found that the "surplusage set out in connection with allegations of mailing . . . did more to confuse than to clarify;" the court then dismissed the indictment pursuant to Fed. R. Crim. P. 7(c)). Even without the securities counts, the indictment is already 52

pages in length and involves 84 counts. Because the court finds that defendants have been sufficiently put an notice of the charges levied against them, and because the indictment will protect them from any possible double jeopardy in the future, the instant motion to dismiss is DENIED.

F. Disclosure of Grand Jury Material to A Private Party:

Defendants move this court to dismiss their indictment due to alleged government breaches of grand jury secrecy in violation of Fed. R. Crim. P. 6(e). Specifically, defendants contend, and the government admits, that a private party (i.e., an independent art expert) reviewed the Dali artwork which was produced pursuant to legitimate grand jury subpoenas. *See* Government's Memorandum at 48. Because of this "disclosure" to a private party, defendants arguably have reason to believe that other grand jury materials also were disclosed to private citizens. At the very least, defendants ask this court to require the government to produce the order which authorized such disclosure, to identify each and every item disclosed to a private party, to identify the reasons supporting such disclosure, and to show why such disclosure to private parties, rather than to government agents, was necessary and proper. *See* Defendants' Corrected Memorandum at 94. Defendants make no claim of actual prejudice to support the instant motion.

In response to this motion, the court first notes that the government has produced the court order which authorized the instant disclosure and this document has been unsealed. *See* Sixth Rule 6(e)(3)(B) Disclosure Notice (Feb. 4, 1988). Moreover, the court finds that the disclosure of subpoenaed Dali artwork to art expert Peter Morse does not constitute a violation of Fed. R. Crim. P. 6(e); that artwork simply is not subject to Rule 6(e)'s general secrecy requirement. The "touchstone of Rule 6(e)'s applicability is whether the disclosed materials would 'elucidate the inner

workings of the grand jury.'" *U.S. v. Benjamin*, 852 F. 2d 413, 417 (9th Cir. 1988) (U.S. appeal pending), *quoting Senate of Puerto Rico v. U.S. Dept. of Justice*, 823 F.2d 574, 583 (D.C. Cir. 1987). Evidence is not "cloaked in secrecy" merely because it has been presented to the grand jury for its consideration. *See id., citing U.S. v. Lartey*, 716 F.2d 955, 964 (2d Cir. 1983). In this case, the Dali artworks reveal absolutely nothing material as to what transpired during the grand jury's deliberation process. *See U.S. v. Phillips*, 843 F. 2d 438, 441 (11th Cir. 1988) ("only documents that reveal some secret aspect of the grand jury investigation should be subject to the restrictions of rule 6(e)"). *Contra Greenspun v. C.I.R.*, 622 F. Supp. 551, 555 (D.D.C. 1985). Defendants' argument that the instant "disclosure" somehow revealed the "focus of the grand jury's investigation" is plainly ludicrous — all Dali art *was* the focus of that investigation. Moreover, these same Dali artworks were previously being sold by defendants to the general public.

Moreover. none of Rule 6(e)'s underlying interests have been jeopardized through this discrete disclosure of artworks. These interests, which drive the need for grand jury secrecy, are the following:

1. To protect witnesses' willingness to come forward and testify fully and frankly;

2. to reduce risk of flight by grand jury targets;

3. to assure that persons accused are not damaged in their reputations; and

4. to protect the grand jury from outside interference.

Benjamin at 417-18. *See also U.S. v. Mayes*, 670 F.2d 126, 129 n.1 (9th Cir. 1982). Defendants have failed to articulate any prejudice resulting from the independent expert's review of the Dali artwork — save for the fact that the expert apparently concluded that none of the analyzed works were unquestionably genuine." Government's Memorandum,

Exhibit 10. Defendants, in fact, concede that the true thrust of their argument is prosecutorial misconduct.

However, even if the Dali artwork were subject to the restrictions of Rule 6(e), defendants, instant motion would be without merit. Pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i), disclosure otherwise prohibited by Rule 6(e) may be effected "when so directed by a court preliminarily to or in connection with a judicial proceeding." *Id. See also Benjamin* at 419 (pursuant to this rule, district courts have discretion "to order the disclosure of grand jury materials to private parties aiding the government's investigation"). In this case, this court expressly authorized the disputed disclosure after the government had moved *ex parte*. The requisite "particularized need" was found to inhere to the unusual context in which the government's request was made — the need to establish the authenticity of alleged works of Dali art. *See id.* (the court found the requisite "particularized need" in the fact that the private expert was "uniquely able" to aid in the government's investigation). *See also Mayes* at 129 (disclosure of grand jury material was made to a medical expert).

Moreover, the court, on two separate occasions, expressly apprised defendants of the fact that the subpoenaed artwork would be presented to *appropriate* art experts, as well as to the grand jury, for independent examination. *See, e.g.*, Order Affirming Magistrate's Order (Oct. 21, 1987) at 4; Order (July 23, 1987) (Tokairin, Mag.) at 2 ("[u]pon receipt of the prints, the government may retain them for ninety (90) days for presentation to the grand jury *and examination by appropriate expert witnesses*") (emphasis added). Non-government personnel may qualify as "appropriate experts." *See Benjamin* at 419. Thus, defendants' motion to dismiss on the basis of alleged violations of Rule 6(e) is DENIED. Because the court finds no disclosure of Rule 6(e) material in the instant context, the government need not justify its

use of art expert Peter Morse to defendants. Accordingly, defendants' alternative motion is also DENIED.

G. Violations of Due Process Due to Hearsay-Based Opinion:

Defendants next challenged the indictment's validity on grounds that the government improperly secured the charges from the grand jury in violation of their constitutional due process rights. Such manipulation of the grand jury is said to have resulted from the fact that expert opinion testimony, in lieu of either direct or indirect testimony by Salvador Dali, was presented to the grand jury with regard to the authenticity of Dali artworks. *See* Defendants' Corrected Memorandum at 96. According to defendants, this "weird mix of *hearsay based purported expert opinion*" demands dismissal of the indictment, because "[t]he obvious, quintessential, if not only, witness as to the truth or falsity of these alleged misrepresentations concerning Salvador Dali's actions was, of course, Salvador Dali." *Id.* (emphasis in original). The government's conduct is claimed to be "particularly egregious," because a local newspaper had indicated that Dali was apparently willing to meet with U.S. law enforcement personnel to aid in their efforts. *Id.* at 97. Defendants primarily rely on *U.S. v. Estepa*, 471 F.2d 1132 (2d Cir. 1972), to support their claim that indictments predicated significantly on hearsay-based opinion testimony must be dismissed.

At the outset, the court notes that the Ninth Circuit Court of Appeals has expressly rejected *Estepa* and its reasoning which authorizes the dismissal of indictments if hearsay alone is deliberately used when better evidence is available. *See U.S. v. Samango*, 607 F.2d 877, 880 n.6 (9th Cir. 1979), *citing U.S. v. Chanen*, 549 F.2d 1306, 1311 (9th Cir. 1977), *cert. denied*, 98 S.Ct. 72 (1977). Accordingly, the Ninth Circuit follows a much different rule than that

followed by the Second Circuit Court of Appeals. Within the Ninth Circuit:

> An indictment based *solely* on hearsay evidence does not violate the Fifth Amendment; nothing more is constitutionally required of an indictment than that it be "returned by a legally constituted and unbiased grand jury."

Samango at 880 n.6, *quoting Costello v. U.S.*, 76 S.Ct. 406, 409 (1956), *reh'g denied*, 76 S.Ct. 692 (1956) (emphasis added). In fact, this federal district court "does not seem to have the discretion to dismiss an indictment merely because some incompetent evidence was admitted." *Id.* Moreover, defendants proffer no authority to support their fall-back proposition that the "wrong kind of hearsay evidence" was used in this case. To accept defendants' novel proposition in this vacuum would be to impermissibly impinge on the independence of grand juries.

Nevertheless, even under the *Estepa* rule, defendants have offered no proof showing that Dali was, in fact, physically able to testify before the grand jury. Such proof is necessary to refute the government's claim that Dali was bedridden in Spain for many years prior to his recent death. Moreover, as previously noted, defendants cannot shift all blame onto the government for not preserving the testimony of Dali and Amiel. *See U.S. v. Alderdyce*, 787 F.2d 1365, 1370 (9th Cir. 1986). Defendants themselves had sufficient notice and opportunity to conduct depositions of these now-deceased witnesses in order to prepare for possible future litigation — defendants concede that they were aware of the fact that an indictment was forthcoming in 1987. Furthermore, government agent John Ellis traveled to Spain in 1988 in order meet with Dali, but was refused on two separate occasions. Absent proof of affirmative misconduct, allegations that the government failed to preserve Dali testimony as a tactical matter will not suffice. *See id.* Any challenges to the appropriate weight given to expert opinion testimony can

be made at trial. For these reasons, defendants' motion to dismiss on grounds of impermissible use of opinion testimony is DENIED.

H. Previously Suppressed and Tainted Evidence was Considered by the Grand Jury:

On February 26, 1988, Judge Rafeedie held that the government's April 15, 1987, search of Center Art's galleries was unconstitutionally overbroad. *See In re Motion for Return of Property Pursuant to Rule 41,* 681 F. Supp. 677 (D. Haw. 1988), *aff'd sub nom. Center Art Galleries-Hawaii, Inc. v. U.S.,* 875 F.2d 747 (9th Cir. 1989). Thus, Rafeedie ordered the return and suppression of all evidence seized in the unlawful raid *other than that related to artworks by artist Salvador Dali. See id,* at 687-88. Defendants now argue that their indictment must be dismissed, because the grand jury's decision to indict was allegedly *based* on such previously suppressed and tainted evidence. Specifically, defendants identify four documents that arguably were improperly brought to the grand jury's attention.

Defendants' argument is displaced, since defendants make no showing that "tainted" evidence was *materially* used to support the indictment. Presentation of suppressed evidence to the grand jury in this case was at most *de minimus,* consisting only of the following documents: 1) a letter from grand jury witness Brigitte Eitingon to defendants Wiseman and Mett; 2) a blank sheet of paper with a purported signature by Dali; and 3) two separate diagrams showing how reproductions of Dali's work, "Battle of Tetuan," would appear on two separate sizes of paper. *See* Government's Memorandum at 59. *In camera* review of Brigitte Eitingon's ("Eitingon") grand jury testimony reveals that testimony related to the first document consisted of less than one transcript page. The other documents were not even recognized by Eitingon, so that *no* meaningful

testimony was adduced. *See id.* Such minimal consideration must be viewed in the context of lengthy grand jury deliberations which produced thousands of pages of transcript testimony.

Of equal significance is the fact that these documents were introduced in December of 1987, *prior* to Judge Rafeedie's suppression order, *and were withdrawn immediately thereafter.* The government, therefore, cannot be said to have acted in bad faith. Merely because the search inventory list was also revealed to the grand jury does not alter this conclusion. *In camera* review of testimony related to this inventory reveals that such discussion was brief and not material. Although this specific offer of proof cannot be condoned, it does not justify the drastic remedy of dismissal.

Furthermore, when suppressed evidence is used *for grand jury purposes only,* such use is not *per se* invalid — the language of the underlying suppression order must be scrutinized in order to determine its scope. In this case, Judge Rafeedie clearly did not mean for his order to work a complete and final bar to the government. Upon reconsideration of his suppression order, Rafeedie expressly contemplated and provided for the government to later *subpoena* the effected material, so long as the government first returned that material in compliance with his original order. According to the court:

> If the government wishes to enforce the subpoena as to material seized in the raid, it must await the return of property pursuant to this Court's [suppression] Order.

Order Denying Motion to Stay and Motion to Reconsider, Civil No. 88-76 (Mar. 23, 1988) at 3.

The Ninth Circuit Court of Appeals, upon affirming Rafeedie's order, similarly rejected defendants' argument that "Rule 41(e)'s plain language requires, *without exception,* suppression of all illegally seized evidence." *Center Art*

Galleries-Hawaii, Inc. at 752 (emphasis added). *See also* Amendments to the Federal Rules of Criminal Procedure (Effective Date Dec. 1, 1989) (according to Rule 41(e)'s new language, "[i]f the motion is granted, the property shall be returned to the movant, *although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings*"; this new language is evidence that the present absolute language of Rule 41(e) is not meant to be taken literally). The Court of Appeals emphasized that Rule 41(e) is purely procedural in nature. *Id. See also U.S. v. Roberts,* 852 F.2d 671, 673 (2d Cir. 1988), *cert. denied.* 109 S.Ct. 556 (1988). Thus, suppressed items clearly can be reintroduced through the doctrines of "independent source" and "inevitable discovery." *See Center Art Galleries-Hawaii, Inc.* at 755.

This court previously discussed Judge Rafeedie's criticial distinction in its lengthy consideration of the six grand jury subpoenas that were challenged. *See In re Grand Jury Proceedings* at 1211. Finding that the government had finally complied with the return of all illegally seized materials per Rafeedie's instructions, the court at that time concluded that "the subpoena process no longer should be foreclosed to [the government]." *Id.* The court then concluded that exclusionary rule challenges were premature at the grand jury stage, due to the peculiar role played by grand juries in the American criminal justice system. *See id.* at 1211-14 (the court also found that the government had identified separate legitimate independent sources for subpoenaed materials). Defendants' attempts to reargue these identical points at this time, therefore, must be rejected.

Thus, even if the grand jury considered tainted evidence in the course of reaching its indictment, of which there is minimal proof, such consideration does not warrant dismissal. As the Supreme Court noted in *U.S. v. Calandra*, "The validity of an indictment is not affected by the character of

the evidence considered." *Id.*, 94 S.Ct. 613, 618 (1974). *Accord, e.g., Gelbard v. U.S.*, 92 S.Ct. 2357, 2367 (1972), *quoting U.S. v. Blue*, 86 S.Ct. 1416, 1419 (1966) ("[t]he 'general rule' . . . is that a defendant is not entitled to have his indictment dismissed *before* trial simply because the Government 'acquired incriminating evidence in violation of the law,' even it the 'tainted evidence was presented to the grand jury' "); *U.S. v. Zielezinski*, 740 F.2d 727, 732 (9th Cir. 1984); *U.S. v. Sears, Roebuck & Co., Inc.*, 719 F.2d 1386, 1391 n.7 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 1441 (1984); *U.S. v. Vandemark*, 522 F.2d 1019, 1021 (9th Cir. 1975); *In re Grand Jury Proceedings* at 1213; *In re Eight Grand Jury Supoenae Duces Tecum*, 701 F. Supp. 53, 56 (S.D.N.Y. 1988). The court refers the parties to its previous lengthy discussion on this identical issue. *See In re Grand Jury Proceedings*, 707 F. Supp. 1207 (D. Haw. 1989).

Defendants' attempts to circumvent this court's previous order on the identical issues is wholly without merit; *Calandra* does not distinguish between pre-indictment and post-indictment scrutiny of the "quality" of evidence considered by grand juries. The appropriate remedy for improperly seized materials is suppression of that evidence for use at trial, rather than dismissal of the indictment. *See In re Grand Jury Proceedings* at 1212. *Accord In re Eight Grand Jury Supoenae Duces Tecum* at 56. Any impropriety on the government's part in presenting previously suppressed evidence to the grand jury, of which there is little proof in this case, can be sanctioned in ways other than dismissal. *Cf., e.g., Sears, Roebuck and Co.* at 1390-91 (although the court found abusive conduct on the part of the prosecutor, it refused to dismiss the indictment and cautioned that such a remedy should rarely be invoked): *Nix v. Williams*, 104 S.Ct. 2501, 2510 (1984). Defendants have failed to make the requisite showing that the alleged prosecutorial misconduct undermined the grand jury's ability to make "an informed and objective evaluation of the evidence presented

to it". *Id.* at 1391 (the court emphasized that the relevant inquiry does not focus on the prosecutor's degree of culpability, but rather on the impact of the misconduct on the grand jury's impartiality). The instant situation differs greatly from that in which grand juries reach their charging decision on the basis of perjured testimony. *See U.S. v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974). The truth of the evidence upon which the instant indictment was reached is not at issue. Moreover, the *Basurto* reasoning has been severely criticized by many courts. *See U.S. v. Maceo*, 873 F.2d 1 (1st Cir. 1989).

For all these reasons. the motion to dismiss the indictment on grounds of suppression and taint is DENIED. The court's conclusion in this regard merely upholds the indictment's validity, and does not address the issue of suppression of evidence for use at trial. Defendants' motion to suppress will be considered later.

II. MOTIONS TO PRODUCE ITEMS

A. Production of Records Concerning the Grand Jury Selection Process:

Pursuant to 28 U.S.C. § 1867(f) and *Test v. U.S.*, 95 S.Ct. 749 (1975), defendants ask this court to compel the government to produce records regarding the grand jury selection process. Defendants seek review of these documents "to determine if grounds exist for a motion to dimiss the indictment on the basis of under-representation of any distinctive group due to systematic exclusion." Defendants' Corrected Memorandum at 95. The government does not oppose this motion. Accordingly, the court GRANTS the instant motion, so that these records will be produced pursuant to 28 U.S.C. § 1867(f). As noted in *Test*, "[t]his provision makes clear that a litigant has essentially an *unqualified* right to inspect jury lists." *Id.* at 750 (emphasis in original).

B. Production of Grand Jury Transcript Pursuant to Rule 6(e):

Defendants next ask this court to compel the government to produce the *entire* grand Jury transcript pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i) and (ii). These provisions authorize defendants to seek the production of these otherwise sealed documents on the following grounds:

> (i) [W]hen so directed by a court preliminarily to or in connection with a judicial proceeding; and
>
> (ii) when permitted by a court at the request of the defendant, *upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.*

Fed. R. Crim. P. 6(e)(3)(C) (emphasis added). A request for grand jury transcripts on these grounds is within the sound discretion of the trial court. *U.S. v. Walczak*, 783 F.2d 852, 857 (9th Cir. 1986) (the court denied the production request). *See also U.S. v. Malquist*, 791 F.2d 1399, 1402 (9th Cir. 1986), *cert denied*, 107 S.Ct. 445 (1986). Primarily relying on Rule 6(e)(3)(C)(ii), defendants justify their request by contending that they "are informed and believe that the Government presented evidence to the grand jury that had been ordered suppressed." Defendants' Corrected Memorandum at 182. Thus, defendants arguably require access to the grand jury transcripts to pinpoint precisely what and how much suppressed evidence was presented to the grand jury, and how that evidence was utilized. *Id.*

Defendants' reliance on Rule 6(e)(3)(C)(ii) to justify the instant disclosure of grand jury transcripts is without merit. The court already rejected the substance of defendants, identical argument when it denied their motion to dismiss the indictment on grounds that previously suppressed and tainted evidence had been considered by the grand jury. In rejecting that motion, the court noted that

"[t]he validity of an indictment is not affected by the character of the evidence considered." *U.S, v. Calandra*, 94 S.Ct. 613, 618 (1974). Thus, even if the grand jury transcript were to reveal significant consideration of previously suppressed evidence, such revelations could not form the basis of a meritorious motion to dismiss. *See U.S. v. Murray*, 751 F.2d 1528, 1533 (9th Cir. 1985), *cert denied*, 106 S.Ct. 381 (1985) (the court upheld the district court's denial of defendant's transcript request, since the claimed prosecutorial misconduct would not have compelled dismissal of the indictment). Unlike situations which involve the use of perjured testimony before the grand jury. *See U.S. v. Basurto*, 497 F.24 781, 785 (9th Cir. 1974), the consideration of even "tainted" evidence does not call into question the inner workings of the grand jury. As noted before, the *use* of "tainted" evidence has no relation to the *truth* of that evidence. Moreover, this court has already reviewed *in camera* those portions of the grand jury transcript which relate to the four suppressed items brought to the grand Jury's attention. This review revealed that testimony related to these four documents, as well as to the inventory list, was unrevealing.

Because Rule 6(e)(3)(C)(ii) provides no basis on which defendants may pin their instant request, they must rely on disclosures permissible under Rule 6(e)(3)(C)(i). In order to satisfy the foundational elements necessary to invoke this alternative disclosure provision, the moving party must make a showing of "particularized need" that must be balanced against the need for grand Jury secrecy. *U.S. v. Basurto*, 852 F.24 413, 419 (9th Cir. 1988) (U.S. appeal pending). To satisfy this "particularized need" requirement. however, defendants merely reiterate that they seek disclosure "for the purpose of identifying and responding to the unconstitutional use of suppressed evidence before the grand jury." Defendants' Corrected Memorandum at 186. Because this court has already noted that grand jury use of such

evidence is not unconstitutional, defendants "need" is insufficient to warrant relief under this provision as well; at most, the prosecution's proffer of such evidence to the grand jury may be grounds for disciplinary action.

Moreover, defendants merely speculate as to the fact that the grand jury transcripts will reveal such alleged prosecutorial misconduct; no proof of such alleged misconduct is proffered to support their charges. *See id.* at 184 (defendants argue that the transcript is "likely" to disclose facts which would warrant dismissal of the indictment). The Ninth Circuit Court of Appeals has repeatedly emphasized that such speculation is insufficient to justify disclosure of the grand jury's inner workings:

> The defendant's assertion that he has no way of knowing whether prosecutorial misconduct occurred does not constitute a particularized need outweighing the need for grand jury secrecy.

U.S. v. Bennett, 702 F.2d 833, 836 (9th Cir. 1983). *See also U.S. v. DeTar*, 832 F.2d 1110, 1113 (9th Cir. 1987) (the court refused to permit disclosure of the grand jury transcript, despite the fact that defendant claimed that "an unnamed grand juror told him that a previous grand jury had voted not to indict," and the prosecutor had informed the court that no prior grand jury had refused to indict); *Walczak* at 857. Defendants are not entitled to satisfy their unsupported suspicions merely, to engage in wholesale fishing expeditions. *See, e.g., U.S. v. Ferreboeuf*, 632 F.2d 832. 835 (9th Cir. 1980), *cert denied*, 101 S.Ct. 1398 (1981); *In re Hunter*, 520 F. Supp. 1020, 1022 (W.D. Mo. 1981), *aff'd*, 673 F.2d 211 (8th Cir. 1982) (per curiam).

Further emasculating defendants' instant request for the production of the entire grand jury transcript is the fact that the court's power to compel such wholesale production pursuant to Rule 6(e) is limited by the Jencks Act, 18

U.S.C. § 3500(a). *See U.S. v. Mays*, 460 F. Supp. 73, 575 (E.D. Tex. 1978). According to the Jencks Act:

> In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

18 U.S.C. § 3500(a). *See also* Fed. R. Crim. P. 16(a)(2) (limits application of the Jencks Act in specific situations). This proscription "clearly includes a transcript of grand jury testimony." *Mays* at 575. *See also U.S. vs. Miller*, 771 F.2d 1219, 1230 (9th Cir. 1985) ("[s]tatements made by a witness before a grand jury are covered by the Jencks Act"). Defendants cannot be allowed to bypass the Jencks Act in this way.

For all these reasons, the court refuses to grant defendants, request for the production of the *entire* grand Jury transcript. Here allegations as to a case's complexity do not fulfill the "particularized need" requirement. *Contra U.S. v. Evans & Associates Const. Co., Inc.*, 839 F.2d 656, 659 (10th Cir. 1988), *reaff'd on reh'g*, 857 F.2d 720, 722 (10th Cir. 1988) (on both considerations, the court ignored the government's Jencks Act argument because it had not been raised in the trial court). Furthermore, because only two individuals have been indicted in this case, the risk of wrongful attribution of criminal responsibility is not high. *Contra Dennis v. U.S.*, 86 S.Ct. 1840, 1842 (1966) (these risks were high in this case which involved 14 defendants). Defendants simply have failed to proffer sufficient reason for this court to lift the veil of secrecy surrounding the instant

grand jury matter. As has often been noted, the reasons for such secrecy are manifold and should not be underrated:

> [A]lthough several reasons exist, the one most important to this case is the desire to create a sanctuary, inviolate to *any* intrusion except on proof of some special and overriding need, where a witness may testify, free and unfettered by fear of retaliation.

State of Texas v. United States Steel Corp., 546 F.2d 626, 629 (5th Cir. 1977), *cert. denied*, 98 S.Ct. 262 (1977). Although the instant grand jury has already finished its work, this "fear of retaliation" persists; not all who testified before the grand jury will be called to testify at trial.

Nevertheless, because the government agrees to provide the transcripts of grand jury testimony of those witnesses it will call at trial, *see* Government's Memorandum at 25, defendants' Rule 6(e) motion is GRANTED to this limited extent. To avoid additional delays in this trial, these limited portions of the transcript should be produced at least thirty (30) days prior to trial; the parties have estimated that roughly 60 to 100 witnesses will testify at trial.

C. Production of All Written and Recorded Statements Pursuant to Rule 16(a):

Defendants' motion for the production of all written and recorded statements pursuant to Fed. R. Crim. P. 16(a) is analogous to the previous motion brought pursuant to Fed. R. Crim P. 6(e) — Rules 6(e) and 16(a) are interrelated and, thus, analyses under these rules inevitably overlap. *See U.S. v. American Oil Co.*, 286 F. Supp. 742, 751-53 (D.N.J. 1968) (defendants' discovery motions was simultaneously brought pursuant to both rules). *See also* Fed. R. Crim. P. 16(a)(3) (according to this provision, Rule 16 does not relate to the discovery of grand jury transcripts, *except* as provided in *Rules 6,* 12(i), 26.2, *and 16(a)(1)(A)*). The instant Rule 16(a) motion, however, is broader in scope,

since it requests the production of statements made both inside and outside the grand jury. Specifically, defendants ask this court to compel the production of *all* written and recorded statements of Center Art's past and present employees, officers, agents, directors and attorneys. Defendants' Corrected Memorandum at 146.

Although objecting to the instant motion, the government contends that the following relevant disclosures have already been made: all statements by defendants Matt and Wiseman to which the government was privy; and all statements made by Center Art employees to the grand jury "in their capacity as employees of the corporate defendant." Government's Memorandum at 75. The government also assures that it will disclose all Jencks Act (18 U.S.C. §3500) materials "on the Friday prior to trial." Government's Memorandum at 77. Specifically, the government promises the following cooperation:

> [T]hat every witness's [sic] testimony will be provided to the defendant before the witness testifies and all material and witness's [sic] testimony, to the extent it contains *Brady* [i.e. exculpatory] material, will also be handled over prior to that time.

Id. at 79. *See also U.S. v. Cadet,* 727 F2d 1453, 1467 (9th Cir. 1984) (the government has a constitutional duty under *Brady v. Maryland,* 83 S.Ct. 1194 (1963) to disclose any exculpatory information to the accused). In view of such promised disclosure, defendants' wide-open discovery request is arguably nothing more than an unwarranted fishing expedition. Thus, to the extent additional materials are being sought, the government objects to the instant motion.

Defendants rely on Rules 16(a)(1)(A)(1) and (2) to obtain all *grand jury testimony* of Center Art's past and present employees and officers. The relevant portion of Rule 16(a)(1)(A) states as follows:

> Where the defendant is a corporation . . . the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of that testimony, so situated as an officer or employee as to have been able *legally to bind* the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense so situated as an officer or employee as to have been able *legally to bind* the defendant in respect to that alleged conduct in which the witness was involved.

Fed. R. Crim. P. 16(a)(1)(A) (emphasis added). According to defendants, all testimony by Center Art employees and officers, both past and present, fall within the scope of the above provisions, because these persons were so situated as to legally bind Center Art to their actions. The government disagrees, contending that Center Art's employees were themselves victims of the alleged fraud perpetrated by defendants — i.e., these employees believed the "phony sales representations they made." Government's Memorandum at 76. Furthermore, the government argues that the court, at most, should disclose only those statements made by Center Art employees which relate to matters that could legally bind the corporation.

Whether or not Center Art's employees believed the representations they made is irrelevant to the court's analysis pursuant to Rule 16(a)(1)(A). In order for defendants' grand jury production request to be justified, all that is required is that Center Art's employees were so personally situated as to legally bind the company to their conduct — i.e., that representations concerning Dali art were made. *See*

Fed. R. Crim. P. 16(a)(1)(A)(1) and (2). Center Art's employees and officers, acting as sales agents of Dali artworks to the public, clearly satisfy this requirement. The government's indictment itself is replete with allegations that defendants' sales agents played an integral role in the alleged fraudulent scheme. *See, e.g.,* Indictment ¶ 2 ("the defendants *and their sales employees and other Center Art personnel* . . . would and did unlawfully enrich themselves by fraudulently selling to the public inexpensive art reproductions at grossly inflated prices by misrepresenting . . .") (emphasis added); Indictment ¶ 5("Mett and Wiseman instructed *their staff to represent*, and they represented themselves, that the relatively worthless art reproductions attributed to Dali . . . had significant investment value") (emphasis added). *See also* Indictment ¶ 6, 8, 9, 10, 11, 14. Given the magnitude of the alleged art fraud, as well as the case's inherent complexity, defendants' motion for the production of all grand jury statements of both past and present employees is meritorious as to that testimony related to actions which could legally bind that corporation. *See U.S. v. Hughes,* 413 F.2d 1244, 1252 (5th Cir. 1969), *vacated as moot,* 90 S.Ct. 817 (1970) (the court noted that non-officers often play a more significant role in the corporation's actions under inquiry than an officer, and that criminal prosecutions of corporations resemble the most complex of civil cases which justify more liberal discovery; the court then permitted the discovery of testimony by all present and former officers and employees). *See also American Oil Co.* at 753; *U.S. v. Deardorff,* 343 F. Supp. 1033, 1044-45 (S.D.N.Y. 1971); *U.S. v. Stone,* 319 F. Supp. 364, 368 (S.D.N.Y. 1970); *U.S. v. Venn,* 41 F.R.D. 540, 542 (S.D. Fla. 1966); *U.S. v. United Concrete Pipe Corp.,* 41 F.R.D. 538, 539 (N.D. Tex. 1966).

Because corporations necessarily must rely on employees to do their "talking," those employees who appeared before the grand jury spoke as defendant Center Art for all intents

and purposes. *See State of Texas v. United States Steel Corp.*, 546 F.2d 626, 630 (5th Cir. 1977), *cert. denied*, 98 S.Ct. 262 (1977). Thus, statements related to actions that could legally bind Center Art should be discoverable in the same way as are the statements of individual defendants Mett and Wiseman, which statements already have been produced. Consistent with its previous decision under Rule 6(e), therefore, the court GRANTS the production of records *relating to grand jury testimony* of all Center Art employees, past and present, pursuant to Rule 16(a)(1)(A); such records will be restricted to that which refers to matters that could legally bind the corporation. This order does not contravene the Jencks Act in any way, because the corporate context is expressly exempt from that statute's coverage by federal rule. *See* Fed. R. Crim. P. 16(a)(2). (Rule 16(a)(1)(A) is exempt from restrictions of the Jencks Act, 18 U.S.C. § 3500). *Contra, e.g., Cadet* at 1469 (Rule 16(a)(1)(A) was not before the court); *U.S. v. Mills*, 641 F.2d 785, 790 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 409 (1981). (Rule 16(a)(1)(A) did not apply, because prison inmates, rather than employees, were the government's prospective witnesses). The government must produce these records at least thirty (30) days prior to trial.

Defendants' additional production request, which seeks related employee records *outside* the grand jury context, is more problematic. Without providing any case authority to support this broad disclosure request, defendants merely cite to Fed. R. Crim. P. 16(a)(1)(C). According to that rule:

> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the

> defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

Fed. R. Crim. P. 16(a)(1)(C). Defendants must make a prima facie showing of "materiality" to obtain discovery pursuant to this rule. *Cadet* at 1468. General descriptions of materials sought, and conclusory arguments as to their materiality, are insufficient to satisfy this standard. *See id.* Having proffered no authority to support their broad Rule 16(a)(1)(C) discovery request, defendants have failed to satisfy that rule's materiality requirement and their motion is DENIED to that extent. The court notes that defendants' unguarded request for *non*-grand jury materials may violate protected government "work product." Accordingly, for the reasons set forth above, defendants' Rule 16(a) motion is GRANTED IN PART AND DENIED IN PART.

D. Production of Electronic Recordings Pursuant to Rule 16(a):

Pursuant to Fed. R. Crim. P. 16(a)(1)(A), defendants also opaquely ask this court to compel the production of all "surreptitious electronic recordings." Defendants' Corrected Memorandum at 158. Rule 16(a)(1)(A) states, in pertinent part, as follows:

> [T]he government shall permit the defendant to inspect and copy or photograph: *any relevant* written or *recorded statements made by the defendant*, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government;

Id. (emphasis added).

Lodging no objection to the instant motion, the government contends that it has already fully complied with

Rule 16(a)(1)(A) by providing defendants with the following: "copies of all electronic recordings of all conversations with officers and employees of Center Art and statements made by them within the possession, custody or control of the government that are known to the government's attorney." Government's Memorandum at 81. Prosecuting attorney Leslie Osborne also swore to the same under oath at the time of oral argument. Moreover, the government contends that it has provided whatever transcripts of those conversations which exist, and "acknowledges its continuing duty to and over such materials as they may be obtained in the future." *Id.* Defendants' motion, therefore, is GRANTED, and the court finds that the government already has fully complied with the instant request. The court also orders reciprocal compliance on the part of defendants, who will be barred from introducing their own electronic evidence at trial if they do not fully comply.

E. Production of Government's Exhibit List Pursuant to Rule (16(a):

Relying on Fed. R. Crim. P. 16(a)(1)(C), defendants next ask the court to compel the government to inform them "not later than 60 days before trial precisely what items of tangible evidence it intends to offer against the Defendants in the case-in-chief at trial." Defendants' Corrected Memorandum at 195. Rather than specify each item of evidence it plans on using at trial, the government merely produced six boxes of discovery materials to defense counsel, which boxes allegedly contain over 10,000 documents. *See id.* at 193. Because of the sheer quantity of documents involved, defendants contend that they are unable to adequately prepare their defense. The government, on the other hand, argues that defendants have "no *right*" to this information at this early date . . . instead, the matter rests in the sound discretion of this court." Government's Memorandum at 85-86 (emphasis in original). According to the government, de-

fendants' instant complaint is essentially one of "too much discovery." *Id.* at 85. Moreover, the prosecution contends that it has not as yet identified those exhibits that it plans to introduce at trial. Thus, the government argues that local practice should be followed in this case — i.e., the exhibit list need only be produced and exchanged the Friday prior to trial. *Id.* at 89.

As the government itself concedes, resolution of the instant issue is "within the sound discretion of the district court." *U.S. v. Anderson*, 481 F.2d 685, 693 (4th Cir. 1973), *aff'd*, 94 S.Ct. 2253 (1974). *See also U.S. v. Whitehorn*, 710 F. Supp. 803, 821 (D.D.C. 1989); *U.S. v. Madeoy*, 652 F. Supp. 371, 375 (D.D.C. 1987). The court may exercise its supervisory powers in order to promote efficient and just case management. Factors for the court to consider in exercising such discretion include the following:

1. The need for such early disclosure in order to promote effective trial preparation;

2. the need for such early disclosure to guarantee effective cross-examination at trial;

3. the need for such early disclosure to promote efficient and just judicial case management;

4. the prejudice which demonstrably may result from such early disclosure; and

5. the intrinsic reasonableness of the request.

See Madeoy at 375 (the court notes the relevance of all factors save for factor 4; "possible witness intimidation" is not a factor in the instant context, since defendants seek only early disclosure of the government's exhibit list, not its witness list). A balance of these factors, if struck in movant's favor, suggests sufficient "materiality" to warrant disclosure under Rule 16(a)(1)(C).

In view of this case's enormous complexity, the court finds that the above balancing test supports defendants' position — disclosure of the government's exhibit list will promote the ends of both fairness and efficiency. *See Madeoy* at 376 ("production of the list will simplify the administration of a complex trial without causing prejudice to the prosecution"). The government alludes to no prejudice that could result from the instant disclosure, whereas defendants have established a case of "compelling need." *Id.* 375. Merely because defendants have numerous attorneys working on their behalf, does not mean that it is proper for the court to subject them to needless and wasteful attorneys' fees in order to search for needles in haystacks. *But see Whitehorn* at 822. Parties should not be prejudiced simply by the fact that they have effective legal representation. Thus, the government's policy of "open" discovery — i.e., of "dumping" documents — is so overwhelming as to effectively amount to no "meaningful" discovery.

Moreover, early disclosure of the government's exhibit list will ensure that both parties are ready for trial *on* the October 31, 1989 trial date. By facilitating prompt trial preparation, and thereby avoiding additional continuances in this matter (one has already been granted), the relief here promotes judicial efficiency, for all these reasons, defendants' motion for production of the government's exhibit list is GRANTED. Accordingly, the government must produce in good faith an initial exhibit list at least six weeks (42 days prior to trial. An amended and updated list must then be produced at least three weeks (21 days) prior to trial. To facilitate this schedule, the government must complete all witness interviews by October 1, 1989.

F. Production of Evidence Relating to Prior "Bad Acts" Pursuant to Federal Rule of Evidence 404(b):

Although referred to in *one* sentence of their original 195 page memorandum, defendants' next production request was first substantively addressed in their *untimely-filed* reply memorandum. Specifically, defendants argue that the government should be required to inform them "no later than 60 days prior to trial [of] what 'bad acts' evidence it intends to offer" at trial. Defendants' Reply Memorandum at 114. The court refuses to address this tardy argument at this time for a number of reasons. First, as already noted, defendants' reply memorandum of 127 pages was filed late and in violation of this court's local rules. *See* Local Rule 220-3. As a result, the court need not even consider defendant's untimely papers. *See* Local Rule 220-11. Second, the government has had little opportunity to respond to this late filing. Third, defendants' authorities do not support the broad proposition for which they are cited — i.e., the court *may*, but *need not*, decide such 404(b) matters during pretrial hearings. *See, e.g., U.S. v. Scott*, 767 F.2d 1308, 1310 (9th Cir. 1985); *U.S. v. Mehrmanesh*, 689 F.2d 822, 831-32 (9th Cir. 1982); *U.S. v. Foskey*, 636 F.2d 517, 526 n.8 (D.C. Cir. 1980); *U.S. v. Herrera-Medina*, 609 F.2d 376, 378 (9th Cir. 1979). In fact, in *U.S. v. Capo*, the district court had disposed of the matter by means of a motion *in limine*. *See id.*, 595 F.2d 1086, 1094 n.8 (5th Cir. 1979), *reh'g denied*, 599 F.2d 499 (9th Cir. 1979), *cert. denied*, 100 S.Ct. 660 (1980). Finally, the court is satisfied that the instant discovery request duplicates that which is covered by the court's previous bifurcated discovery order — that order compels the government to produce exhibit lists both six weeks and three weeks prior to trial. Defendants' instant motion is DENIED.

III. MOTION FOR BILL OF PARTICULARS PURSUANT TO RULE 7(f)

In an attempt to "flesh out" the charges contained in the now 84 count indictment (i.e., the securities counts have already been dismissed), defendants ask this court to direct the government to file a bill of particulars pursuant to Fed. R. Crim. P. 7(f). Despite the indictment's lengthy nature (i.e., now 52 pages), defendants contend that it "totally fails to specify the most rudimentary particulars of the alleged fraud — that is, *who* made *what* misrepresentation or omission to *whom* on *what date*, *where*." Defendants' Corrected Memorandum at 159 (emphasis in original). Accordingly, defendants list, on pages 165 through 180 of their supporting memoradnum, their specific requests for additional facts which arguably are necessary in order for them to prepare an adequate defense.

A bill of particulars is used to complement an already sufficient indictment; it cannot be used to save an otherwise deficient indictment. *See* 1 C. Wright, *Federal Practice and Procedure; Criminal 2d* § 129 (2d ed. 1982). Accordingly, the fact that this court has already found the instant indictment to be sufficient, is not an argument against now granting the request bill. *See id. See also U.S. v. Debrow*, 74 S.Ct. 113, 115-16 (1953); *U.S. v. McCoy*, 492 F. Supp. 540, 545-46 (M.D. Fla. 1980). The need for a bill of particulars is scrutinized slightly differently than when courts look to an indictment's sufficiency. A bill of particulars' underlying purposes are three-fold:

1. To minimize surprise at trial;

2. to allow the defendant to prepare a defense; and

3. to protect against double jeopardy.

U.S. v. Chavez, 845 F.2d 219, 220 (9th Cir. 1988). *See also U.S. v. Giese*, 597 F.2d 1170, 1180 (9th Cir. 1979), *cert. denied*, 100 S.Ct. 480 (1979). Whether to grant a defen-

dant's motion for a bill of particulars is "within the sound discretion of the trial court." *Chavez* at 220. *See also Giese* at 1180; *U.S. v. Federbush*, 625 F.2d 246, 252 (9th Cir. 1980); *U.S. v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987): *U.S. v. Panza*, 750 F.2d 1141, 1148 (2d Cir. 1984). The proper test to be used is "whether the defendant has enough information about the offense charged to enable him to prepare adequately for trial." *U.S. v. Graham*, 487 F. Supp. 1317, 1320 (W.D. Ky. 1980), *quoting Federal Practice and Procedure* § 129. In applying this test, courts must presume the defendant to be innocent and, therefore, ignorant of the facts on which the charges are based. *Federal Practice and Procedure* § 129.

Emphasizing the second prong of the above three-part test, the court finds that the government's instant indictment is adequate in its detail and contains sufficient information to inform defendants of the charges brought against them. As the court has already found in considering defendants' various motions to dismiss, the mail and wire fraud counts have been sufficiently plead. *See Royal Coast Development Corporation v. Chalon Corporation*, Civil No. 89-00037 HMF (Mar. 31, 1989) at 20-22 (this court recently noted the more stringent pleading requirements for cases involving general fraud as compared to those involving mail and wire fraud). Unlike cases of general fraud, the government need not set forth the whos, whats, whys, whens, and wheres in mail and wire fraud cases. *See U.S. v. Politi*, 334 F. Supp. 1318, 1321 (S.D.N.Y. 1971) (court refutes its earlier conclusion reached in *U.S. v. Pilnick*, 267 F. Supp. 791, 801 (S.D.N.Y. 1967) and finds defendant's request for the "identity of persons present at overt acts, the names of persons who made statements and their contents" to be nothing more than "fishing for the Government's evidence"). *See also U.S. v. Finly*, 705 F. Supp. 1272, 1278 (N.D. Ill. 1988) (the court considered a mail and wire fraud indictment similar to that here at issue and denied defen-

dant's motion for a bill of particulars); *U.S. v. Panza*, 750 F.2d 1141, 1148 (2d Cir. 1984) (no bill or particulars was needed, because defendants were sufficiently apprised of their "conduct" in furtherance of the alleged scheme).

Moreover, the government has provided sufficient detail with regard to the substance of the misrepresentations allegedly made by defendants — most of the Dali art, about which the alleged misrepresentations were made, has been identified. *See* Indictment ¶ 12, 13. Given the mail and wire fraud conspiratorial liability context, the government need not reveal all overt acts which it may later offer into evidence. *Politi* at 1321 (the court held that such requests are "frivolous," for they seek "to elicit the Government's whole case"). *See also U.S. v. Uriarte*, 575 F.2d 215, 218 (9th cir. 1978), *cert. denied*, 99 S.Ct. 449 (1978); *U.S. v. Colson*, 662 F.2d 1389, 1391 (11th Cir. 1981); *U.S. v. Johnson*, 575 F.2d 1347, 1357 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 1213 (1979). For these reasons, defendant's motion is without merit and is DENIED; defendants have been sufficiently put on notice by the elements of the mail and wire fraud counts charged against them.

CONCLUSION

The court DENIES the following motions to dismiss: 1) that based on prejudicial pre-indictment delay; 2) that based on prejudicial pre-indictment publicity; 3) that for defective theories of fraud; 4) that for insufficient and defective indictment; 5) that for disclosure of grand jury material to a private party; 6) that for violations of due process related to hearsay-based opinion testimony; and 7) that for previously suppressed and tainted evidence being considered by the grand jury. The court, however, GRANTS defendants' motion to dismiss counts 85 through 93 for failure to state claims of securities fraud.

With regard to the various motions for the production of items, the court finds as follows: 1) the court GRANTS the motion for production of records concerning the grand jury selection process; 2) the court DENIES the motion to produce all grand jury transcripts pursuant to Fed. R. Crim. P. 6(e); 3) the court GRANTS IN PART AND DENIES IN PART the motion for production of all other statements pursuant to Fed. R. Crim. P. 16(a); 4) the court GRANTS the motion to produce all electronic recordings pursuant to Fed. R. Crim. P. 16(a); 5) the court GRANTS the motion to produce the government's exhibit list pursuant to Fed. R. Crim. P. 16(a); and 6) the court DENIES the motion which seeks the production of all "bad acts" evidence pursuant to Fed. R. Evid. 404(b).

The court also DENIES defendants' motion for a bill of particulars pursuant to Fed. R. Crim. P. 7(f). Finally, with regard to the individual motions to suppress that were also argued at these hearings, the court will issue a separate order following the submission of additional papers by the parties which are due September 11, 1989.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, August 31, 1989.

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UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA V. CENTER ART GALLERIES-HAWAII, INC., et al.; Criminal No. 89-00125 HMF; ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' VARIOUS MOTIONS TO DISMISS, FOR THE PRODUCTION OF ITEMS, AND FOR A BILL OF PARTICULARS